

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
vs. )  
GERALD JOHNSON, et al., ) CRIMINAL NO.: JKB-16-0363  
 )  
Defendant. )  
 )  
 )  
 )

Transcript of Motions Hearing  
Before the Honorable James K. Bredar  
Wednesday, October 11th, 2017  
Baltimore, Maryland

For the Plaintiff:

Peter J. Martinez, AUSA

Christina A. Hoffman, AUSA

For Defendant Gerald Johnson:

Paul F. Enzinna, Esquire

Jeffrey B. O'Toole, Esquire

For the Defendant Wesley Jamal Brown:

Harry J. Trainor, Jr., Esquire

Christopher M. Davis, Esquire

For the Defendant Montel Harvey:

William L. Welch, III, Esquire

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APPEARANCES (Cont'd)

For Defendant Kenneth Jones:

Alan R.L. Bussard, Esquire

For Defendant Marquise McCants:

John R. Francomano, III, Esquire

For the Defendant Joseph Bonds:

Gerald C. Ruter, Esquire

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P R O C E E D I N G S

THE COURT: Good morning. Be seated, please.

Mr. Martinez, you may call the case.

MR. MARTINEZ: Good morning, Your Honor. I call criminal case number JKB-16-0363, United States versus Gerald Thomas Johnson, Wesley Jamal Brown, Montell Harvey, Kenneth Jones, Marquise McCants, and Joseph Bonds.

Peter Martinez for the government, with me at counsel table are Christina Hoffman, AUSA, and Special Agent Lisa Christy of ATF. We're here for day two of our pretrial motions hearing.

THE COURT: Thank you. Good morning, counsel. Mr. Enzinna.

MR. ENZINNA: Good morning, Your Honor. Paul Enzinna and Jeffrey O'Toole for Gerald Johnson.

THE COURT: Mr. Davis.

MR. DAVIS: Christopher Davis and Harry Trainor on behalf of Wesley Brown.

THE COURT: Mr. Welch.

MR. WELCH: Good morning, Your Honor. I am William Welch on behalf of Mr. Harvey. I need to tell the Court something when you're ready.

THE COURT: Thank you. Mr. Bussard.

MR. BUSSARD: Good morning, Your Honor. Alan Bussard representing Kenneth Jones, who is to my right at the

1 trial table.

2 THE COURT: Mr. Francomano.

3 MR. FRANCOMANO: John Francomano representing  
4 Mr. McCants. Good morning, Your Honor.

5 THE COURT: Good morning. Mr. Ruter.

6 MR. RUTER: Good morning. Gerald Ruter on behalf of  
7 Mr. Bonds. He's seated to my right.

8 THE COURT: Thank you. Mr. Martinez, Mr. Welch, you  
9 may approach.

10 (Bench conference on the record.)

11 MR. WELCH: Good morning. We have reached an  
12 agreement in the principle to a plea again this morning. My  
13 understanding is that the government is going to re-extend the  
14 plea offer that it had made previously. Mr. Harvey would like  
15 to accept that. The government needs to make a couple of  
16 revisions to the document. There was an element to the  
17 offense, I believe, that was left out. Also, Ms. Hoffman  
18 informed me the government will not be moving for the third  
19 level, but once those revisions are done, I just need to go  
20 over it with Mr. Harvey. I think that the government can  
21 probably do those revisions and I can meet with Mr. Harvey  
22 during the lunch recess. So I would ask to, if possible, kick  
23 our motions to the very end of the pecking order and then  
24 hopefully we could accomplish this all this afternoon if you  
25 can accommodate us.

1 THE COURT: All right. So are Mr. Welch's motions  
2 unique and exclusive to his client?

3 MS. HOFFMAN: They are.

4 THE COURT: So this is a process that can be  
5 accommodated.

6 MS. HOFFMAN: Yes, we can. We do have three  
7 witnesses here. We'll have to hold them.

8 THE COURT: Okay. So we will be on an extended  
9 lunch break today between 12:00 noon and 2:00 p.m., it will be  
10 two hours. So that should be ample time to get all the  
11 documents together to get the final questions resolved and for  
12 counsel to be in a position at 2:00 o'clock to advise me that  
13 there was a signed plea. And then if I hear that, then at  
14 some point during the afternoon, probably after we have heard  
15 all of the other motions, we just haven't heard yours, we will  
16 adjourn the motions hearing and flip over to a Rule 11  
17 proceeding for your client alone. And that's how we could  
18 conclude the day, that's how I see it.

19 MR. WELCH: Fair enough, Your Honor. That's fine.

20 THE COURT: Thank you.

21 (The following proceedings were had in open court.)

22 THE COURT: Okay. Mr. Martinez, I think we were  
23 dealing with Pioneer and the house search.

24 MR. MARTINEZ: Correct, Your Honor. It was my  
25 understanding that we left off with Mr. Francomano's challenge

1 to the protective sweep and the subsequent obtaining of a  
2 search warrant for the residence and the execution of that  
3 search warrant.

4 THE COURT: All right. So the first issue I want to  
5 hear about, Mr. Francomano, is standing. And do you want to  
6 present evidence in regard to -- I take it that the government  
7 challenges standing.

8 MR. MARTINEZ: We do, indeed, Your Honor. As we  
9 explained in our motions papers, I think the best showing  
10 Mr. McCants can make here is that he may have been an  
11 overnight guest at the home. Even if he shows that, I don't  
12 think it gets him all the way there. The principle recognized  
13 in *Minnesota versus Olson* is based on a long-standing social  
14 custom of people having overnight guests in their house. The  
15 6th Circuit has found in the *Stuckey* case that that principle  
16 is no longer recognized when you're dealing with a fugitive  
17 from an arrest warrant. So even if Mr. McCants can show  
18 somehow that he was an overnight guest at 5617 Pioneer Drive,  
19 it's our position that he still had no reasonable expectation  
20 of privacy in that house. But as of now there's no evidence  
21 in the record. We're not even in a place where he has shown  
22 that he was an overnight guest, so we think there is a --

23 THE COURT: What's the government's proffer on whose  
24 house it was?

25 MR. MARTINEZ: Your Honor, we don't know. As best

1 we can tell, it was a flop house or stash house where  
2 narcotics were packaged.

3 THE COURT: Well, who -- what's the physical  
4 condition of the premises? I mean, is it a vacant or is it a  
5 place where people, you know, somebody apparently lives? Are  
6 there utilities connected?

7 MR. MARTINEZ: There were utilities connected, and  
8 clearly the lights were on on the night the arrest was made.  
9 There was mail in the house. I think there was a piece of  
10 mail, as Mr. Francomano has said in his motions papers, there  
11 was a piece of mail with Mr. McCants's name on it. So we  
12 don't dispute that the house may have been inhabited to some  
13 extent. But by the same token, some of the wiretap intercepts  
14 that Sergeant Landsman and his team were getting at the time,  
15 and I think Your Honor heard a call yesterday where  
16 Mr. McCants told Mr. Dorsey something to the effect of, "I'm  
17 at SQ" and Dorsey says, "What?" and he says, "28th."

18 Our intelligence at the time and the FBI's suspicion  
19 at the time was that Mr. McCants was staying at a residence in  
20 the 400 block of East 28th Street. And that's why Sergeant  
21 Landsman explained that the FBI had camped out there, because  
22 they were thinking he was staying at that residence and that's  
23 where he was going to be based on the wiretap calls, all of  
24 which suggests, I think, it's further evidence that 5617  
25 Pioneer Drive wasn't a house he had any real connection to.

1 So we would submit that he still has a burden to carry to show  
2 that he had an expectation of privacy.

3 THE COURT: Mr. Francomano, that's just a proffer,  
4 do you have a proffer?

5 MR. FRANCOMANO: I do, Your Honor.

6 THE COURT: What is it?

7 MR. FRANCOMANO: Mr. McCants was not only an  
8 overnight guest, he'd stay there at least 15 or 16 different  
9 times. The owner of the home, Mr. Edges, had given him a key,  
10 said he could come and stay anytime he'd like. He had invited  
11 guests come with him to stay there. His belongings were in  
12 the home, he had a number of toothbrushes, hair products,  
13 personal belongings up in the bedroom. Your Honor --

14 THE COURT: So how are you going to prove all this?

15 MR. FRANCOMANO: Mr. McCants is going to testify as  
16 to standing.

17 THE COURT: Okay. Well, I think that's where we go  
18 first.

19 MR. FRANCOMANO: Thank you, Your Honor.

20 THE COURT: I need to be persuaded on that issue.  
21 If you've got no standing, the rest of it's not relevant. I  
22 take it that he takes the stand to protect his interest with  
23 respect to the standing issue and for no other reason. And  
24 his taking the stand should not be interpreted as any broader  
25 waiver of his Fifth Amendment right against self-incrimination



1 than what is necessary to address the standing issue, and that  
2 you claim that right of his to testify in a limited way to  
3 vindicate his right.

4 MR. FRANCOMANO: And that is correct, Your Honor.

5 THE COURT: Okay. Government agrees that the  
6 defendant in taking the stand to testify does not thereby  
7 generally waive his Fifth Amendment rights with respect to the  
8 broader issues in this case, that he's entitled to take the  
9 stand and put on proof that goes strictly to standing without  
10 subjecting himself to cross-examination on wider topics, nor  
11 to a finding of the Court that he has, generally speaking,  
12 waived the Fifth?

13 MR. MARTINEZ: Understood, Your Honor.

14 THE COURT: And that's the law, you agree that's the  
15 law; right, Mr. Martinez?

16 MR. MARTINEZ: Yes, Your Honor.

17 THE COURT: Mr. Francomano.

18 MR. FRANCOMANO: Thank you. Defense calls Marquise  
19 McCants.

20 THE COURT: Mr. McCants, please come forward to be  
21 sworn. Come all the way into the witness box, remain on your  
22 feet, face the clerk. Right there, sir. Raise your right  
23 hand.

24 MARQUISE MCCANTS,  
25 called as a witness, being first duly sworn, was examined and

1 testified as follows:

2 THE WITNESS: Yes.

3 THE CLERK: Thank you. You can have a seat. Please  
4 state and spell your first and last name for the record.

5 THE WITNESS: Marquise McCants, M-a-r-q-u-i-s-e;  
6 McCants, M-c-C-a-n-t-s.

7 THE COURT: If you would, Mr. McCants, slide forward  
8 a little bit so that the microphone is closer to your face.  
9 Thank you, sir.

10 Mr. Francomano, your witness.

11 MR. FRANCOMANO: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. FRANCOMANO:

14 Q Mr. McCants, you were arrested on February 5th, 2017 at  
15 5617 Pioneer Drive; is that correct?

16 A Yes.

17 Q Are you familiar with that address?

18 A Yes.

19 Q Why are you familiar with that address?

20 A Because that's the address that I was residing at, at the  
21 time.

22 Q And who owns that -- who was renting that address at the  
23 time?

24 A Jonathan Edges.

25 Q How do you know him?

1 A My mother used to date him about ten years ago.

2 Q How did you get in and out of the home?

3 A He gave -- I had a key.

4 Q And how many times did you stay at that home?

5 A No less than 15 times.

6 Q Were you given permission by Mr. Edges to stay there?

7 A Yes.

8 Q Did you have other people stay there as well?

9 A Yes.

10 Q Were they allowed to stay there per your permission and  
11 Mr. Edges's permission?

12 A Yes, I had a room in the house.

13 Q How many nights were you staying there prior to your  
14 arrest?

15 A Every day of the week probably, besides the weekend.

16 Q Did you have any property there?

17 A Yes, I had property there.

18 Q Like personal belongings?

19 A Yes.

20 Q What kind of personal belongings?

21 A Shoes, no less than 20 pair of shoes, all my underwear.

22 Clothes was there in the first room upstairs to your left,

23 where I slept at. I had a TV there, a mattress. I had a

24 toothbrush, toothpaste, soap in the bathroom, also trimmers.

25 I had food in the refrigerator downstairs. I also had clothes

1 in the basement next to the washer and dryer. Phones there,  
2 mail.

3 THE COURT: I'm sorry, sir.

4 THE WITNESS: Mail.

5 THE COURT: Mail.

6 THE WITNESS: Yes.

7 Q (BY MR. FRANCOMANO) Mail with your name on it?

8 A Yes, mail with my name on it.

9 Q And when you would leave, would you take everything with  
10 you?

11 A No.

12 Q You would leave all that stuff there?

13 A Yeah, no point, because I was coming back later on that  
14 night.

15 MR. FRANCOMANO: No further questions, Your Honor.

16 THE COURT: Cross-examination.

17 CROSS-EXAMINATION

18 BY MR. MARTINEZ:

19 Q Mr. McCants, Jonathan Edges goes by the nickname Toby; is  
20 that right?

21 A Yes.

22 Q And Toby is involved in distributing narcotics, isn't  
23 he?

24 MR. FRANCOMANO: Objection.

25 THE COURT: How's it relevant?

1 MR. MARTINEZ: I thought you said overruled, Your  
2 Honor.

3 THE COURT: I'm sorry?

4 MR. MARTINEZ: I'm sorry, I thought you said  
5 overruled.

6 THE COURT: No, I said how is it relevant? I  
7 haven't ruled yet.

8 MR. MARTINEZ: Well, because to the extent that  
9 Mr. Edges may have been distributing or packaging narcotics  
10 out of that house, it goes to the privacy interests. I think  
11 *Minnesota versus Carter* says that if a house is used for drug  
12 distribution it affects the occupants expectation of  
13 privacy.

14 THE COURT: Okay. That's a good argument, but  
15 nevertheless sustained. Next question.

16 Q (BY MR. MARTINEZ) Mr. McCants, did you hear the  
17 testimony about the firearms that were recovered from the  
18 silver Honda that was parked out in the driveway outside the  
19 residence at 5617 Pioneer Drive, did you hear the testimony --

20 MR. FRANCOMANO: Objection.

21 THE COURT: What's the relevancy of that?

22 MR. MARTINEZ: One of the firearms recovered from  
23 that vehicle came back to a murder in the 1400 block of  
24 Popland that was committed by Mr. Edges.

25 THE COURT: Yes, so how does that help us on

1 deciding whether or not there's standing?

2 MR. MARTINEZ: Mr. Edges is a --

3 THE COURT: Is it your theory that to the extent  
4 that his connection to the premises was mostly about unlawful  
5 conduct that somehow that dilutes his standing?

6 MR. MARTINEZ: Yes. Mr. Edges was a drug-dealing,  
7 violent BGF member who was providing safe harbor for another  
8 gang member while he was fleeing an arrest warrant.

9 THE COURT: All right. So for purposes of this  
10 standing question, I will make that assumption, that based on  
11 the totality of the information that's been presented to the  
12 Court so far, that's a reasonable finding and assumption for  
13 the Court to make. And it's really unnecessary to develop any  
14 further evidence in that regard. So the objection is  
15 sustained. But that's not to undercut the government's  
16 theory. Next question.

17 Q (BY MR. MARTINEZ) Mr. McCants, you were aware as of late  
18 January, early February, that there was a federal arrest  
19 warrant for you, were you not?

20 A No, I wasn't.

21 Q Are you telling this court you didn't know you had been  
22 indicted in a racketeering case and that there was an arrest  
23 warrant for you?

24 A No, I don't watch the news.

25 Q So then you didn't tell Mr. Edges there was an arrest

1 warrant for you either?

2 A No.

3 Q He didn't know you were a fugitive?

4 A Because I didn't know.

5 MR. MARTINEZ: No further questions, Your Honor.

6 THE COURT: Okay. Redirect.

7 MR. FRANCOMANO: No, Your Honor.

8 THE COURT: You may step down.

9 Any evidence on standing, Mr. Martinez?

10 MR. MARTINEZ: No, Your Honor.

11 THE COURT: I take it you don't have anything else,  
12 Mr. Francomano.

13 MR. FRANCOMANO: No, Your Honor.

14 THE COURT: Any evidence on standing, Mr. Martinez?

15 MR. MARTINEZ: Your Honor, we would still submit he  
16 hasn't carried his burden. Even if he stayed in that house 15  
17 or 16 times, the fact of the matter is he's a fugitive. And  
18 there's no precedent, in fact, every legal -- the only legal  
19 authority we've been able to find says that if you're an  
20 overnight guest for purposes of ducking an arrest warrant, you  
21 have no reasonable expectation of privacy. And so we would  
22 submit there's still a standing problem that can't be overcome  
23 here.

24 THE COURT: Suppose you are a fugitive, but staying  
25 at what anyone would recognize is your own home because you

1 own it or you have a lease there or whatever else, do you  
2 continue to have standing --

3 MR. MARTINEZ: You have standing in that residence  
4 if it's your residence, if you're the leaseholder. But I  
5 don't think any proof has been advanced here in that regard.

6 THE COURT: Okay. But stay with me on the  
7 hypotheticals. At some point a person -- a person's  
8 connection to premises ripens to the point where they are  
9 residing there and you've just conceded that if someone is  
10 residing in that premises, even if they're a fugitive, dealing  
11 drugs out of the place, discussing murders that they  
12 committed, storing firearms that they used to kill people  
13 with, they still have standing there; right, if they also  
14 reside there?

15 MR. MARTINEZ: I think, Your Honor, residing is a  
16 murkier term than the primary inhabitant of a personal  
17 residence or a leaseholder. And residing could encompass an  
18 overnight guest. And what the law --

19 THE COURT: What about somebody is a fugitive and  
20 they go down to the local Holiday Inn and they rent a room for  
21 the night, do they have standing in that hotel room if they  
22 are staying there and there's a search of those premises and  
23 they want to challenge some aspects of that search?

24 MR. MARTINEZ: I think it depends on the facts, Your  
25 Honor. I think if there's evidence that that person is



1 fleeing from an arrest warrant and they're on the run and  
2 they're staying at hotels to cover their tracks, I think in  
3 that situation, I don't think the law is prepared to call any  
4 subjective expectation of privacy they may have in that hotel  
5 room reasonable.

6 THE COURT: Thank you, Mr. Martinez. I find the  
7 defendant has standing based on testimony that I heard. I  
8 found it credible in this respect. The defendant indicated  
9 that he had spent many nights there, maybe as many as 15.  
10 More importantly were the ties that he had to property that  
11 was there; that he had a mattress there, that he had a TV  
12 there, that he had clothing in the basement near the washing  
13 machine, that he had his toothbrush and toothpaste there. And  
14 to me, those are all indicia of a degree of a residential  
15 connection to property.

16 Certainly, a residence that is being used by a  
17 person who is a fugitive solely as a hideout or a place to  
18 evade detection, or a residence that is being used solely as a  
19 stash house or place to have meetings to plan illegal  
20 activities like murders and robberies and so forth, is not --  
21 those connections to a property are not going to give rise to  
22 standing in this sense. But where there are these other  
23 indicia that I have referred to, it's completely conceivable  
24 to the Court that the property is playing several different  
25 roles in this person's life and that's how this appears to me

1 based on the proof that was presented.

2 All right. So the defendant has standing. So now  
3 let's move on. I think we heard yesterday what  
4 Mr. Francomano's overall contention is, that the -- the Court  
5 has already ruled that the confrontation by the police at the  
6 Pioneer -- is Pioneer Road -- Pioneer?

7 MR. MARTINEZ: Pioneer Drive, Your Honor.

8 THE COURT: Pioneer Drive residence, was legitimate,  
9 that they got there without poisonous fruit and that the  
10 arrest itself was lawful. The arrest occurred outside the  
11 structure; correct, Mr. Martinez?

12 MR. MARTINEZ: Yes, Your Honor.

13 THE COURT: Okay. And then immediately subsequent  
14 to that arrest, I think what the government has informed the  
15 Court is that police, without a search warrant, then entered  
16 the premises to conduct a protective sweep.

17 MR. MARTINEZ: That's correct, Your Honor. That's  
18 what Sergeant Landsman testified to yesterday.

19 THE COURT: Okay. And Mr. Francomano, your  
20 contention is that the protective sweep was not justified by  
21 the circumstances as a consequence. The entry at that point  
22 was an illegal warrantless entry of the premises. And that to  
23 the extent that evidence was detected in plain view during  
24 that protective sweep and then disclosed in a subsequent  
25 affidavit in support of an application for a search warrant,

1 it's all tainted and the chain is sort of cut at that point,  
2 and the Court should suppress all of the evidence that was  
3 discovered on those premises from the protective sweep  
4 forward. Is that the basic thrust of it?

5 MR. FRANCOMANO: Exactly, Your Honor.

6 THE COURT: All right. So Mr. Francomano has raised  
7 that issue, I think it's back to the government now to put on  
8 their proof to the extent that they contest Mr. Francomano's  
9 allegation. I take it that's where you want to go,  
10 Mr. Martinez?

11 MR. MARTINEZ: Your Honor, I think we've already put  
12 on our proof as far as Sergeant Landsman got on the stand and  
13 explained that at the time Mr. McCants was taken into custody,  
14 law enforcement was reasonably concerned that there might be  
15 other people inside the residence, and that those people might  
16 be armed, and that that's why they did the protective sweep.

17 THE COURT: Tell me a little bit more about the  
18 reasonableness of the fear that there might be other armed  
19 people in the residence.

20 MR. MARTINEZ: Sure, Your Honor. Throughout the day  
21 on February 4th, the FBI had been intercepting telephone  
22 conversations between Mr. McCants and co-conspirators in which  
23 they were planning acts of violence. Within an hour or hour  
24 and a half before arresting Mr. McCants, they had tracked his  
25 phone and placed it at the scene of a nonfatal shooting near

1 the intersection of Greenmount and North. And his phone was  
2 tracked immediately from the scene of that shooting to the  
3 5617 Pioneer Drive residence.

4 They were intercepting wiretap calls at the time  
5 between Mr. McCants and other individuals. And they knew that  
6 he was a member of a violent criminal enterprise. He was  
7 fleeing from an arrest warrant. All of those factors taken  
8 together, I think, made it entirely reasonable for Sergeant  
9 Landsman and his colleagues to -- and I haven't even mentioned  
10 the events that occurred while they were standing -- while law  
11 enforcement had surrounded the home. They were dealing with a  
12 stand-off situation here. Mr. McCants initially wouldn't come  
13 out. He then came out the second floor window, tried to  
14 escape, ran back inside, had -- I can proffer to the Court  
15 that had Detective Clark testified yesterday --

16 MR. FRANCOMANO: I'm going to object to that because  
17 he didn't testify yesterday.

18 THE COURT: Yes, so let's not go there. I have a  
19 more specific question for you, Mr. Martinez. Let's take the  
20 arrest warrant affidavit -- the search warrant affidavit.

21 MR. MARTINEZ: Yes.

22 THE COURT: Okay. Let's excise from it --

23 MR. MARTINEZ: Yup.

24 THE COURT: -- any reference to things that were  
25 seen during the protective sweep.

1 MR. MARTINEZ: Uh-huh.

2 THE COURT: And what have we got left?

3 MR. MARTINEZ: Well, then we still have the  
4 information that Mr. McCants has an outstanding federal  
5 indictment for racketeering, has been identified as a member  
6 of BGF. And then the information that Mr. McCants was located  
7 at the scene of a shooting and was tracked leaving the scene  
8 of the shooting to 5617 Pioneer Drive, that he was found  
9 there. He tried to escape out the back window, that upon  
10 confronting the officers, McCants went back into the home and  
11 was heard running to the basement of the house. Investigators  
12 surrounded the home and eventually took Mr. McCants into  
13 custody. That's consistent with what Sergeant Landsman  
14 testified yesterday.

15 THE COURT: That's fine. So Mr. Francomano, would  
16 the affidavit, in support of the application for the first  
17 search warrant, nonetheless have demonstrated probable cause  
18 to justify a search of that house, even if there had been no  
19 reference to anything observed in plain view during the  
20 protective sweep?

21 MR. FRANCOMANO: No, Your Honor. We still believe  
22 that it would still not have enough probable cause. Number  
23 one, the tracking of a cell phone was not a tracking of  
24 Mr. McCants. So there was a tracking of a cell phone in an  
25 area where a shooting took place. Mr. McCants was arrested at

1 the home. We do agree with that. But all the other indicia  
2 does not build up enough to find probable cause. The  
3 ammunition that was found in plain view, the suspected  
4 paraphernalia, the manufacturing and packaging paraphernalia,  
5 if all of those were taken out of the search warrant, Your  
6 Honor, you're left with speculation about a cell phone that  
7 was being tracked and an arrest of Mr. McCants, and that he  
8 also did have a warrant out for him at the time.

9 THE COURT: Thank you, Mr. Francomano. Appreciate  
10 it. I'm ready to rule. First of all, I do find that there  
11 was justification for the protective sweep, that the totality  
12 of the information that the officers had at the moment that  
13 they arrested Mr. McCants outside the house justified a quick  
14 look through the house to make sure that there wasn't someone  
15 else who had potentially been associated with the activities  
16 that the police believe Mr. McCants had been involved in  
17 earlier that evening inside that residence and able to pose  
18 some sort of threat to law enforcement.

19 I think what's important here is broader context,  
20 the length of time that the investigation had been underway,  
21 the general knowledge that the investigators had with respect  
22 to the violent nature of this organization and its different  
23 members. All that coupled with the information that they had  
24 gleaned from listening in on conversations over the course of  
25 that particular evening, and the officers, I find, were

1 justified in taking a quick look through the house for the  
2 reason solely to protect their own safety in the context of  
3 who they were dealing with.

4           Nonetheless, even if the protective sweep itself was  
5 not justified by the circumstances, because the defendant was  
6 arrested outside, because there was at best ambiguous  
7 indications of whether there might be anyone else present or  
8 specifically dangerous, the -- I find the authorities  
9 inevitably would have sought a search warrant for that home,  
10 given that they had found Mr. McCants there and given what he  
11 was not just suspected of, but what they had probable cause to  
12 believe he had been involved in, there would have been  
13 probable cause to believe that there was evidence inside of  
14 that residence that tied this defendant to the illegal  
15 activities that occurred that evening and perhaps broader  
16 illegal activities.

17           And so we get into a zone of inevitable discovery.  
18 That doctrine comes into play here as justification for  
19 ultimately admitting the evidence. But I've also gone down  
20 this third route, which is to say, suppose we took the  
21 affidavit that was submitted to the state judge and excised  
22 out all the information that was acquired by the officers  
23 during the protective sweep, what are we left with? And I  
24 conclude that that affidavit still would have provided  
25 probable cause for the search of that house in the

1 circumstances that were disclosed in that affidavit.

2 So the search that ultimately really matters here is  
3 the search that was conducted pursuant to the warrant. That's  
4 when the various items that admittedly were seen during the  
5 protective sweep were actually seized and taken by the  
6 government and became the means by which the government has to  
7 introduce during this trial. I find that that search was  
8 lawful.

9 Now we are left with another search that occurred --  
10 was it on the 8th or the 9th? I thought it was obtained on  
11 the 8th and done on the 9th.

12 MR. MARTINEZ: Your Honor's correct.

13 THE COURT: So we're left with that search. And  
14 Mr. Francomano, have you moved to suppress, specifically, the  
15 fruits of that search, and is there something else to be  
16 discussed in light of the rulings that the Court has just made  
17 with respect to the protective sweep and the initial warranted  
18 search?

19 MR. FRANCOMANO: Yes, Your Honor. I have moved to  
20 suppress the 2/8 search warrant as well.

21 THE COURT: Yes.

22 MR. FRANCOMANO: The reason for that, Your Honor, is  
23 once again, there's not enough probable cause. What we're  
24 stating in there is that six of the eight facts using the  
25 affidavit are from the 2 -- the February 5th search warrant.



1 Those were just basically cut and pasted into the 2/8 search  
2 warrant. And then they added two phone calls that they  
3 believed were talking about items in Pioneer Drive.

4 So essentially what they're doing is just adding  
5 on -- or just using prior probable cause for a warrant in  
6 February 8th of 2017 to go back and search again by adding  
7 these two phone calls. If you take out the prior probable  
8 cause from 2/5, you are left with two phone calls that are  
9 vague, do not talk about exactly specifically what items  
10 they're talking about, does not specifically say where the  
11 residence is. At that point, Your Honor, we believe that  
12 there isn't sufficient probable cause.

13 THE COURT: How long after a temporary resident of  
14 premises is no longer residing there do they lose standing to  
15 contest a search of those same premises?

16 MR. FRANCOMANO: Well, Your Honor, I think if they  
17 voluntarily left, I believe that if they took all of their  
18 things and left the home, I think they would lose standing at  
19 that point. All his things were still in the home, his  
20 toothbrush, his shoes. He did not voluntarily leave,  
21 obviously he was taken by the police. So I don't think --

22 THE COURT: Somebody got arrested out of a hotel  
23 room, would they still have standing to contest searches of  
24 that room three days later?

25 MR. FRANCOMANO: If his stuff is in still in the

1 room, I would agree, he would, Your Honor. If they cleaned  
2 out the room and his things were not in the room, then I'd say  
3 he would not have standing. In this situation, all his stuff  
4 was still in the home.

5 THE COURT: Okay. Well, I'm ready to rule. I think  
6 standing is an even closer question on this one, but we're  
7 going to leap over standing and just go to the substance of  
8 it. Did you want to present any evidence in support of your  
9 position?

10 MR. FRANCOMANO: No, Your Honor, thank you.

11 THE COURT: The Court concludes that the search on  
12 the 9th, subsequent to the additional warrant issued on the  
13 8th, was itself lawful. The law enforcement had a legitimate  
14 continuing interest in those premises. I find that the  
15 additional information that they supplied to the Court in  
16 support of the application for the second warrant was new and  
17 that it was relevant and that it did supply a justification  
18 for going back into the house. There's the circumstance that  
19 ammunition or shells were found, but no weapon, in the initial  
20 search. That's another significant fact. That motion to  
21 suppress is denied.

22 All right. Where are we, Mr. Martinez?

23 MR. MARTINEZ: Your Honor, now I think we're at the  
24 motion to challenge the search of the silver Honda Accord  
25 parked outside 56 --

1 THE COURT: Sorry.

2 MR. FRANCOMANO: I'm sorry, I couldn't hear  
3 Mr. Martinez.

4 MR. MARTINEZ: I couldn't hear myself either.

5 THE COURT: So Mr. Francomano, you want a moment to  
6 talk with your client?

7 MR. FRANCOMANO: If I could, Your Honor.

8 THE COURT: Yes.

9 (Pause in the proceedings.)

10 THE COURT: Okay. Mr. Francomano, are we ready to  
11 continue our hearing?

12 MR. FRANCOMANO: We are, Your Honor.

13 THE COURT: Okay. Where are we, Mr. Martinez?

14 MR. MARTINEZ: Your Honor, we're about to take up  
15 the challenge to the search of the silver Honda Accord that  
16 was parked outside the residence.

17 THE COURT: Right.

18 MR. MARTINEZ: And we have Trooper Boyce who did the  
19 K-9 scan here. But again, I think there's also a standing  
20 issue to be addressed first. There's no evidence in the  
21 record that Mr. McCants had a possessory interest in that  
22 vehicle.

23 THE COURT: Let me hear Mr. Francomano on standing  
24 on the car. First of all, let's start with, who's the car  
25 registered to?

1 MR. FRANCOMANO: I don't know, Your Honor, but  
2 that's not our issue. The issue was that the car was in the  
3 curtilage of the property.

4 THE COURT: Okay.

5 MR. FRANCOMANO: And once Trooper Boyce testifies  
6 and I show him the pictures, you can see the car is well  
7 within the curtilage. So if he has standing for the property,  
8 then he has standing for the vehicle that is on the  
9 property.

10 THE COURT: What case says that?

11 MR. FRANCOMANO: *U.S. v. Dunn*, 480 U.S. 294  
12 (1987).

13 THE COURT: Have you got that, Mr. Jaco?

14 THE CLERK: Yes.

15 MR. FRANCOMANO: They set out four factors in that  
16 case.

17 THE COURT: Okay. Tell me about it.

18 MR. FRANCOMANO: Number one, the proximity of the  
19 area claimed to be curtilage to the home, in this case, the  
20 property is one foot from the home, or the car --

21 THE COURT: But we're not really talking about a  
22 homeowner. I think hotel cases would be more relevant.

23 MR. FRANCOMANO: Well, this case, Your Honor, the  
24 hedge encloses the entire -- well, not the entire property,  
25 but the driveway itself. If I could show Your Honor a

1 picture.

2 THE COURT: I can imagine it.

3 MR. FRANCOMANO: Okay. It encloses the driveway in  
4 which the car was in. The car was not on public property, was  
5 not on the street, it was inside the curtilage of the home.

6 THE COURT: You're talking curtilage in a case where  
7 there's questions about whether there's really standing that  
8 goes beyond one room of the house.

9 MR. FRANCOMANO: I believe Your Honor found that  
10 there was standing.

11 THE COURT: I did, but we're right on the edge.

12 MR. FRANCOMANO: Well, Your Honor, if there is  
13 standing, then if the vehicle is within the curtilage, which  
14 we can show that it is, or at least attempt to show that it  
15 is, then he would have standing to object to the search of the  
16 vehicle.

17 THE COURT: We're going to operate on the assumption  
18 that there is standing, recognize --

19 MR. MARTINEZ: We can do that, Your Honor, as a  
20 constitutional matter.

21 THE COURT: Well, if you're going to push me, I find  
22 that there is standing. There you go.

23 MR. MARTINEZ: Fair enough.

24 THE COURT: You pushed, you got an answer. Let's  
25 hear the testimony.

1 MR. MARTINEZ: Okay. We call Trooper Ryan Boyce of  
2 the Maryland State Police.

3 THE COURT: Good morning, sir. Come all the way up,  
4 stand in front of our jury box right there. Come on up, stop  
5 there and face our clerk.

6 THE CLERK: Good morning. Please raise your right  
7 hand.

8 TROOPER RYAN BOYCE,  
9 called as a witness, being first duly sworn, was examined and  
10 testified as follows:

11 THE WITNESS: I do.

12 THE CLERK: Thank you. You can have a seat. Please  
13 state and spell your first and last name for the record.

14 THE WITNESS: It's Ryan, R-y-a-n; last name Boyce,  
15 B-o-y-c-e. Trooper First Class.

16 THE CLERK: Thank you.

17 THE COURT: Good morning. Mr. Martinez, your  
18 witness.

19 DIRECT EXAMINATION

20 BY MR. MARTINEZ:

21 Q Trooper, good morning.

22 A Good morning.

23 Q Could you tell the Court what law enforcement agency you  
24 work for.

25 A Maryland State Police.

1 Q How long have you been with the MSP?

2 A Coming on seven years.

3 Q What's your rank?

4 A Trooper First Class.

5 Q Are you also a K-9 handler?

6 A That's correct.

7 Q Could you describe your duties as a K-9 handler?

8 A I'm a dual purpose K-9 handler, so I do narcotics and  
9 also patrol functions.

10 Q Okay. Let's start with the narcotics function you  
11 described. What is the narcotics component of your K-9  
12 handling duties?

13 A Well, the dog's trained on five different odors of  
14 narcotics.

15 THE COURT: You've got to talk a little bit  
16 slower.

17 A Sorry. The dog's trained in five different odors of  
18 narcotics. He's obviously my partner, do various scans and  
19 searches with him for narcotics.

20 Q (BY MR. MARTINEZ) Okay. What is your dog's name?

21 A Max.

22 Q How long have you worked with Max?

23 A Coming on three years.

24 Q Is Max certified in CDS detection?

25 A He is.

1 Q He's trained to give an alert when he detects drugs; is  
2 that right?

3 A That's correct.

4 Q What kind of alert does he give?

5 A A passive sit response.

6 THE COURT: A passive sit response?

7 THE WITNESS: Yes, sir.

8 Q (BY MR. MARTINEZ) Does that mean he sits down when he  
9 smells narcotics?

10 A That's correct.

11 Q Were Max's CDS detection certifications valid as of  
12 February 5th, 2007?

13 A That's correct.

14 Q Now, you also mentioned that there's a -- I meant 2017,  
15 Trooper, just for the record.

16 A Okay.

17 Q 2007 was before you were with MSP; right?

18 A Yes.

19 THE COURT: That would be a very old dog.

20 A I still have some from then.

21 Q (BY MR. MARTINEZ) Trooper, you also mentioned that you  
22 and your partner Max have a patrol function?

23 A That's correct.

24 Q Can you describe that?

25 A So patrol function would be indicating and locating the



1 whereabouts of a criminal suspect as well as apprehending a  
2 suspect. Everything is in accordance per our patrol policy  
3 with the 1989 Supreme Court ruling *Graham v. Connor*, so  
4 apprehending a suspect.

5 Q Is Max also certified to perform a patrol function?

6 A That's correct.

7 Q All right. I want to direct your attention to the early  
8 morning hours of February 5th, 2017, were you working and on  
9 duty at the time?

10 A That's correct, I was.

11 Q Did there come a time where you were directed to respond  
12 to a residence at 5617 Pioneer Drive in Baltimore City?

13 A That's correct, I was.

14 Q Why were you asked to go to that location?

15 A I was assisting the U.S. Marshals task force with a  
16 warrant service, a federal warrant service.

17 Q And who was the subject of the warrant you were asked to  
18 help serve?

19 A Mr. Marquise McCants.

20 Q So as between your patrol function and your CDS detection  
21 function, which of the functions were you planning to serve  
22 when you went off to 5617 Pioneer Drive?

23 A My primary function that night was patrol, just in case  
24 Mr. McCants fled the residence.

25 Q All right. Now, approximately what time did you arrive

1 at 5617 Pioneer Drive?

2 A I believe it was approximately 12:40 a.m.

3 Q And when you and Max arrived, did you set up at a  
4 particular location on the scene?

5 A We did, side perimeter of the house.

6 Q All right. Show you Government's Exhibit 11A, do you  
7 recognize this?

8 A That's correct.

9 Q So where, in relation to the residence, were you?

10 A So I would have been behind the -- the silver Honda  
11 there, I would have been to the rear of that facing the back  
12 of the residence with the dog.

13 THE COURT: Can you mark on the screen.

14 THE WITNESS: I can just point, sir?

15 THE COURT: Just touch it.

16 A Back around here, behind the car.

17 Q (BY MR. MARTINEZ) Trooper, what, if anything, do you  
18 recall observing from that location?

19 A As my partner and I made our approach, Mr. McCants fled  
20 the residence by jumping on a second floor roof. At that  
21 point I proceeded to give loud verbal commands with my  
22 partner, "state police K-9, get on the ground." At that point  
23 he jumped back through a window to go back in the residence  
24 instead of surrendering.

25 Q After Mr. McCants went back in the residence, did there

1 come a time when you put Max away or inside a vehicle?

2 A At that point I did.

3 Q Why did you do that?

4 A Since I was extensively briefed on Mr. McCants prior to  
5 going down for the warrant service, I knew it could be  
6 possible that he could be armed and dangerous. At that point  
7 we treat it like a barricade. So SWAT team was called from  
8 Baltimore City, put Max back in the car, just because in case  
9 it did turn into a shootout, which I was afraid it could, he  
10 was secure.

11 Q Did Mr. McCants eventually come out of the house?

12 A Eventually.

13 Q And was he taken into custody?

14 A He was.

15 Q After he was taken into custody, were you asked to  
16 conduct a K-9 scan?

17 A That's correct.

18 Q What were you asked to scan?

19 A The silver Honda right next to the house.

20 Q Can you recall whether the car had any license plates?

21 A It did not.

22 Q So did Max scan that silver Honda there?

23 A He did.

24 Q What was the result?

25 A He indicated a positive alert to the odor of a trained

1 narcotic on the vehicle.

2 THE COURT: He gave a positive alert, I'm sorry?

3 THE WITNESS: The positive alert to an odor, the  
4 presence of the odor of a trained narcotic.

5 THE COURT: Of a what narcotic?

6 THE WITNESS: Trained.

7 THE COURT: A trained narcotic.

8 THE WITNESS: Trained narcotic.

9 THE COURT: Oh, a narcotic on which the dog had been  
10 trained?

11 THE WITNESS: Trained, yes. Correct.

12 THE COURT: A lot of buzz words here, but I get  
13 it.

14 Q (BY MR. MARTINEZ) Did Max alert on a particular part of  
15 the vehicle?

16 A Driver's side door handle.

17 Q What did that suggest to you?

18 A That the odor of narcotics was present on that vehicle.

19 Q What did you do when the scan was over?

20 A Secured Max in the vehicle and secured him for the  
21 night.

22 MR. MARTINEZ: Those are all the questions I have,  
23 Your Honor.

24 THE COURT: Cross-examination, Mr. Francomano.

25 MR. FRANCOMANO: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. FRANCOMANO:

Q Trooper, did you find drugs in the car?

A I secured after the dog alerted on the vehicle.

Q Do you know if any drugs were found in the car?

A I'm not aware.

Q What time did you perform the K-9 scan of the vehicle?

A It would have been after Mr. McCants was taken into custody. I don't know the exact time.

Q Would it be in your report?

A Approximate, I believe it would be, yes.

Q 1:30, does that sound about right?

A Sounds correct.

Q This is before the search warrant of the home; correct?

A No. I arrived on scene approximately 12:40 hours, so that would have been after 1:30.

Q Not the arrest warrant, sir, I'm talking about the search warrant.

A I don't know anything about the search warrant because after the dog alerted I left.

Q Okay. So you went to the vehicle at 1:30 -- or you searched -- had the vehicle searched at 1:30; correct?

A If that's what my report says, then yes.

Q I'm going to show you what I'm going to mark as defense -- for identification Defense Exhibit No. 2A.

1 THE COURT: Turn it. Thank you.

2 Q (BY MR. FRANCOMANO) Can you identify that, Trooper,  
3 where that picture is?

4 A It's a little bit blurry, but it looks similar to the  
5 residence where we served the search warrant for Mr. McCants  
6 at 5617 Pioneer Drive.

7 Q To the right of that is where the car was in that  
8 driveway, where that red car is now?

9 A That's correct.

10 Q Can you kind of circle the area where the car was?

11 A Yes, sir.

12 Q I'm going to show you Defense McCants Exhibit 2B. This  
13 is the same --

14 THE COURT: Touch the lower left and that thing will  
15 disappear.

16 Q (BY MR. FRANCOMANO) Can you identify that, Trooper? I  
17 know it's a little blurry.

18 A It's blurry, but it still looks like the residence we  
19 came up, but there's a tree, obviously, in the center of the  
20 picture.

21 Q To the left is the driveway of 5617; correct?

22 A Appears to be.

23 Q There are hedges running along the right side of that?

24 A Appears to be, yes.

25 Q Then there's a hedge at the end of it blocking out the

1 alley; correct?

2 A It appears to be.

3 Q And the driveway is feet from the house; correct?

4 A Yeah.

5 Q And the silver vehicle was located in that driveway and  
6 not on the street; correct?

7 A It was in the driveway, the silver Honda was in the  
8 driveway.

9 Q Now, these pictures that I've shown you, they accurately  
10 depict the way that the house looked?

11 A They're extremely blurry. I can't see numbers exactly,  
12 but to give a general description of the house and the  
13 driveway, then yes.

14 Q So they accurately reflect the way the house looked that  
15 day?

16 A Correct.

17 Q But for the blurriness?

18 A Correct.

19 MR. FRANCOMANO: No further questions.

20 THE COURT: Redirect.

21 MR. MARTINEZ: No, thank you, Your Honor.

22 THE COURT: Thank you, Trooper. You may step  
23 down.

24 THE WITNESS: Thank you.

25 THE COURT: I'll hear you, Mr. Francomano. Is there

1 any other evidence?

2 MR. FRANCOMANO: No, Your Honor.

3 THE COURT: None from the government.

4 MR. MARTINEZ: The dog alerted there was probable  
5 cause --

6 THE COURT: No. No, evidence.

7 MR. MARTINEZ: No other evidence.

8 THE COURT: Just a reflex in you, Mr. Martinez,  
9 can't stop yourself. Mr. Francomano.

10 MR. FRANCOMANO: Your Honor, as I said, this issue  
11 is whether or not the vehicle's in the curtilage, number one.  
12 And then there's a second issue whether or not -- if it is in  
13 the curtilage, whether or not the dog sniff was allowable  
14 because it was inside the premises of the -- of the area of  
15 the home.

16 So number one, is the vehicle in the curtilage? I  
17 think it obviously shows it the way the pictures -- the  
18 pictures show that there's a hedge blocking off any type of  
19 view into the driveway area, into the home itself. It blocks  
20 off from the alley. I believe the driveway and the vehicle  
21 are within the curtilage of the house. And I could go through  
22 the four factors in *Dunn* if Your Honor would like me to.

23 THE COURT: No. What about the fact that -- I mean,  
24 could they have taken the dog in the house as part of the  
25 protective sweep?



1 MR. FRANCOMANO: As part of the protective sweep?

2 THE COURT: Yes.

3 MR. FRANCOMANO: Well, Your Honor, I believe they  
4 could, but they're not taking the dog -- there is no exigency  
5 in the vehicle. No one has ever testified that there was a  
6 bomb in the vehicle that was going to explode or there was  
7 anybody in the vehicle or going into the vehicle. The  
8 protective sweep -- if the dog would have walked around the  
9 car for the protective sweep and alerted, I would agree with  
10 Your Honor. In this situation, it was not where the trooper  
11 was standing and the dog just alerted. He was actually  
12 ordered to perform the scan around the vehicle.

13 THE COURT: But the trooper, with the dog, was  
14 already, not to use old terminology from old cases, but was  
15 legitimately on the premises.

16 MR. FRANCOMANO: I agree with that, Your Honor. But  
17 our difference is --

18 THE COURT: So where is the greater intrusion?

19 MR. FRANCOMANO: The intrusion becomes when he  
20 says --

21 THE COURT: The dog's got to breathe.

22 MR. FRANCOMANO: I agree, Judge.

23 THE COURT: So the dog is inevitably smelling the  
24 air on those premises.

25 MR. FRANCOMANO: And Your Honor, like I said, I

1 agree with you a hundred percent. As your example yesterday,  
2 if you're walking down the street and the dog smells marijuana  
3 in your pocket, that's it. In this situation, if the dog  
4 would have smelled drugs in the car, then I agree with Your  
5 Honor. But it's not that type of situation. The situation  
6 was, Detective Landsman said, "Trooper Boyce, I want you to  
7 perform a scan on that vehicle." And in *Florida v. Jardines*,  
8 569 U.S. 1 (2013), in that case -- I'm sure Your Honor's  
9 familiar with that case, where the officers took a dog up to  
10 the porch and smelled marijuana, and they said you just can't  
11 have --

12 THE COURT: Yes, but those officers weren't  
13 otherwise legitimately on the premises.

14 MR. FRANCOMANO: Like I said, I agree with Your  
15 Honor with that point, but in this case, Detective -- or  
16 Trooper Boyer (sic) was told to perform the scan. That's the  
17 difference. I think right there it turns on whether or not if  
18 it just happened to alert to the drugs, or whether or not  
19 they're told to look for the drugs.

20 THE COURT: Thank you, Mr. Francomano.

21 MR. FRANCOMANO: Thank you, Your Honor.

22 THE COURT: So I find that the dog sniff was legit.  
23 First of all, once again, there's the overall context of what  
24 the officers are investigating in this situation. They have  
25 reason to believe that the defendant may be involved in a

1 broad scope of criminal activity, some of which involves  
2 illegal drugs. The officers were legitimately there on the  
3 premises, within the curtilage attempting to serve a warrant  
4 for the arrest of a fugitive. And as part of that, there was  
5 a dog and K-9 handler present to assist in that apprehension.

6 As it turns out, the dog had multiple skills,  
7 including the ability to sniff for narcotics, controlled  
8 substances. I can't find that there's any greater intrusion  
9 or violation of a privacy right with the dog that's already  
10 legitimately there, being walked around the car that's in the  
11 driveway, which is what happened, and then the dog alerted.

12 It's not the *Florida* situation where there's really  
13 no justification for the narcotics officers to bring a dog up  
14 to the porch of a house, private property, private curtilage.  
15 They were already legitimately there. So I don't find any  
16 Fourth Amendment violation with respect to how this was done.  
17 So that motion to suppress is denied.

18 All right. Now what?

19 MS. HOFFMAN: Your Honor, I believe we're going to  
20 hold Montel Harvey's motions in abeyance for the time being,  
21 so our next motion as to which we have a witness to call is  
22 Mr. Joseph Bond's motion to suppress a firearm that was  
23 recovered from his vehicle on October 23rd of 2013. And the  
24 government will be calling Detective Jamal Neptune.

25 THE COURT: Okay. Mr. Ruter, if you would, just

1 give me a brief thumbnail again, so we can all be reminded as  
2 to what your motion is.

3 MR. RUTER: Your Honor, this is a motion to suppress  
4 a -- the seizure of a handgun in a car driven by Mr. Bonds on  
5 October 2013. He was driving a vehicle in Baltimore City.  
6 Officer Neptune indicated that he had failed to stop at a stop  
7 line, and as a result, he instituted a stop. After stopping  
8 him, he discovered that Mr. Bonds was driving on a suspended  
9 license. There came a time when he placed him under arrest  
10 and then did an inventory search at which time he found this  
11 handgun. We questioned the validity of the stop and the  
12 actual extent of the search itself.

13 THE COURT: Got it. Okay. Let's hear the witness.  
14 Please come forward, sir, stop halfway to the witness stand,  
15 face our clerk.

16 THE CLERK: Good morning. Raise your right hand.

17 DETECTIVE JAMAL NEPTUNE,  
18 called as a witness, being first duly sworn, was examined and  
19 testified as follows:

20 THE WITNESS: Yes, I do.

21 THE CLERK: Thank you. You can have a seat in the  
22 witness box.

23 THE WITNESS: Thank you.

24 THE CLERK: Please state and -- do me a favor, speak  
25 right into the microphone and keep your voice up. Please

1 state and spell your first and last name for the record.

2 THE WITNESS: Jamal Neptune. First name Jamal,  
3 J-a-m-a-l; last name Neptune, N-e-p-t-u-n-e.

4 THE CLERK: Thank you.

5 THE COURT: Your witness.

6 DIRECT EXAMINATION

7 BY MS. HOFFMAN:

8 Q Good morning, Detective Neptune.

9 A Good morning, ma'am.

10 Q Where are you employed?

11 A Prince George's County Police Department.

12 Q How long have you worked there?

13 A Four years this December.

14 Q And what's your rank and position there?

15 A I'm a detective.

16 Q Prior to working for the Prince George's County Police  
17 Department, did you work for the Baltimore Police  
18 Department?

19 A Yes, ma'am.

20 Q How long did you work there?

21 A From 2012, April to 2013, November.

22 Q Can you walk us through the positions you held with  
23 BPD?

24 A I was first in the academy, then I was assigned to  
25 patrol, and then in and out of Flex Units, both the Western

1 District and Southern District.

2 Q I want to direct your attention to October 23rd of 2013  
3 at approximately 4:30 in the afternoon. Were you on patrol in  
4 the Southern District at that time?

5 A Yes, ma'am.

6 Q And is that a high crime area?

7 A Yes, ma'am. There's -- there are numerous calls for  
8 drugs and violent crimes.

9 THE COURT: The entire Southern District --

10 Q (BY MS. HOFFMAN) I should ask you where specifically in  
11 the Southern District were you?

12 A The area that I patrolled specifically was Cherry Hill.

13 Q And is that particular area a high crime area?

14 A Yes, ma'am.

15 THE COURT: All of Cherry Hill is a high crime area?

16 THE WITNESS: Yes, sir.

17 Q (BY MS. HOFFMAN) Did there come a time when you  
18 witnessed a traffic violation?

19 A Yes, ma'am.

20 Q And what did you see?

21 A In the 3300 block of Cherryland Road, I observed a green  
22 Honda Accord right by the intersection of Seagull Avenue fail  
23 to come to a stop before the stop line.

24 Q And what did you do?

25 A So while I was coming down the 3300 block of Cherryland

1 Road, I observed the vehicle coming down Seagull and it drove  
2 through the stop sign and came to a stop inside of the  
3 intersection at Cherryland. And I activated my emergency  
4 light and sirens, conducted a traffic stop.

5 Q What happened once you pulled the car over?

6 A Once the vehicle came to a stop, I approached the vehicle  
7 on the driver's side. And I contacted the driver, asked for  
8 the license and registration, to which I then identified the  
9 driver as Mr. Bonds.

10 Q And was that based on the license that he provided you?

11 A Yes, ma'am.

12 Q Did you run a license check?

13 A Yes, ma'am. I used my -- at the time it was called a  
14 Pocket Cop, had an application on the phone that was issued  
15 through the Baltimore Police Department that had NCIC access  
16 where I was able to run the license for license status.

17 Q And what did you find?

18 A So on the Pocket Cop it stated that the -- that Mr. Bonds  
19 was driving on a suspended license, and I confirmed it with  
20 dispatch through KGA.

21 Q Detective Neptune, were you familiar with Joseph Bonds  
22 before that day?

23 A No, ma'am.

24 Q What did you do after you determined that he was driving  
25 on a suspended license?

1 A Once I determined he was driving on a suspended license,  
2 Mr. Bonds was removed from the vehicle and placed into custody  
3 without incident.

4 Q And did you leave the vehicle sitting in the middle of  
5 the road?

6 A No, ma'am. The vehicle was towed by -- to the city  
7 yard.

8 Q And why did you have the vehicle towed?

9 A Per departmental policy, we have to impound vehicles  
10 pursuant to an arrest of the driver, if the owner and/or no  
11 other occupants are inside the vehicle.

12 Q And was anyone inside the vehicle other than Mr. Bonds?

13 A No, ma'am.

14 Q Did you search the vehicle before it was towed?

15 A I conducted an inventory search.

16 Q Why did you do that?

17 A Again, departmental policy. We have to conduct inventory  
18 searches to protect both ourselves and the individual that  
19 we're towing the vehicle from.

20 Q What, if anything, did you recover from the vehicle?

21 A During the inventory search, I recovered a revolver under  
22 the rear seat of the vehicle. Because it's -- it was like the  
23 rear bench, it was loose and lifted and I was able to --

24 Q You mean the bench was loose?

25 A Yes, ma'am.



1 Q And the firearm was underneath the bench?

2 A Yes, ma'am. It was -- it was underneath the passenger  
3 side of the vehicle.

4 Q And what kind of firearm was it?

5 A It was a .357 magnum revolver, ma'am.

6 Q Was it loaded?

7 A Yes, ma'am, six rounds.

8 Q Was it within reach of the driver's seat?

9 A Yes, ma'am. When you turn back, you could clearly reach  
10 it because it's a small Honda Accord.

11 Q Did you complete a tow vehicle report?

12 A Yes, ma'am.

13 Q I'm going to show you Government's Exhibit 22. Is it  
14 showing up on the screen in front of you?

15 A Yes, ma'am.

16 Q Do you recognize this document?

17 A Yes. This is the towed vehicle report, ma'am.

18 Q And this is the tow vehicle report specifically that you  
19 completed for Mr. Bonds's vehicle?

20 A Yes, ma'am.

21 Q Did you deliver Miranda warnings to Mr. Bonds?

22 A Yes, ma'am, while Mr. Bonds was seated near the vehicle,  
23 as a result of the arrest.

24 Q And did he indicate that he understood his rights?

25 A Initially he nodded his head as an affirmation. And I

1 had him clarify audibly and he said yes.

2 Q And by the way, did you read the rights from memory or  
3 did you read them from --

4 A No, at that time I had a sheet on me. Unfortunately, I  
5 don't have it on me right now.

6 Q Did Mr. Bonds make any statements after you had read him  
7 his Miranda rights?

8 A He said he understood his rights and then I asked him why  
9 he had the gun under the seat, because if I wanted to be able  
10 to access my gun, I know that I'd want it to be clearly within  
11 reach for me, to which he stated that he had it under the seat  
12 to keep it away from his children.

13 Q And Detective Neptune, did you include that statement in  
14 your incident report?

15 A No, I didn't, ma'am.

16 Q And why not?

17 A So a lot of things were going on, unfortunately, my mind  
18 may have forgotten. And also, it was one of my first arrests,  
19 as I was a patrol officer pretty young into my career, and  
20 unfortunately, I just forgot.

21 Q Did you write Mr. Bonds up for the traffic violation?

22 A Yes, ma'am.

23 Q And specifically, what traffic violations did you cite  
24 him for?

25 A I cited him for failure to stop before a stop line. And

1 obviously for the driving on a suspended license, ma'am.

2 MS. HOFFMAN: Thank you. No further questions for  
3 the witness.

4 THE COURT: Thank you. Mr. Ruter.

5 CROSS-EXAMINATION

6 BY MR. RUTER:

7 Q Detective, good morning.

8 A Good morning, sir.

9 Q If we could go through -- you actually prepared a police  
10 report in this case, did you not?

11 A Yes, sir.

12 MR. RUTER: I'd like marked as Bonds Exhibit No. 1,  
13 Your Honor, for identification but later for admission, a one,  
14 two, 11-page document prepared and given to counsel in  
15 discovery.

16 THE COURT: It's all the police report or --

17 MR. RUTER: It is, Your Honor, it is, along with the  
18 statement of probable cause and the like.

19 THE COURT: There's no objection, that's received.

20 MS. HOFFMAN: No objection.

21 Q (BY MR. RUTER) Directing your attention to the statement  
22 of probable cause -- rather, the police report, Detective,  
23 that you prepared this yourself; correct?

24 A Yes, sir.

25 Q And can you see that well enough on the screen, sir?

1 A Yes, sir.

2 Q Now, I know that you start out by indicating that you're  
3 on patrol, and you also note that there have been numerous  
4 calls, reference to acts of violence and illegal narcotics.  
5 You wrote that in your report soon after this event occurred;  
6 correct?

7 A Yes, sir.

8 Q And would you agree with me that in terms of the actual  
9 stop itself, that's not relevant at all, is it?

10 A It was just in reference to the area I was patrolling,  
11 sir.

12 Q You didn't stop this man because he was driving in a high  
13 crime area, did you?

14 A No, sir.

15 Q Nonetheless, it was on your mind, wasn't it?

16 A During the stop, no, sir.

17 Q Pardon?

18 A Not in reference to the stop, no, just the traffic  
19 violation was.

20 Q When did it become a part of your thought process, since  
21 you put it in the report following the actual stop and seizure  
22 of the gun?

23 A It was just to give a description of the area I was in,  
24 sir.

25 Q I see. So your testimony is that was not a part of your

1 thought process, however, when you actually pulled him over;  
2 correct?

3 A No, sir.

4 Q Okay. You write also that, "I observed the driver of the  
5 vehicle fail to stop before the stop line"; correct?

6 A Yes, sir.

7 Q And is there a stop line there, by the way?

8 A I don't know what the street looks like right now, sir.

9 Q I'll show it to you.

10 A Sure.

11 Q What is a stop line?

12 A It would be the line by where the stop sign is, sir.

13 Q Okay. And what's the purpose of a stop line?

14 A To indicate the area where the stop sign is.

15 Q Now, there's -- under the transportation article, a  
16 person can be stopped for going through a stop sign;  
17 correct?

18 A Yes, sir.

19 Q I guess they also can be stopped for going through a stop  
20 line?

21 A Yes, sir.

22 Q Okay. Why did you choose to write in your report that he  
23 failed to stop at a stop line?

24 A Same -- falls under the same violation, sir.

25 Q Yeah, that's because in your judgment he didn't stop at a

1 stop line; correct?

2 A Yes, sir.

3 Q I want to show you Government Exhibit 21 and ask you if  
4 you can identify that.

5 A This is the area where the traffic stop --

6 Q Yeah. And you can see where the stop sign is?

7 A Yes, sir.

8 Q Right here; correct?

9 A Yes, sir.

10 Q And you can see the roadway, can you not?

11 A Correct.

12 Q It's apparently in great disrepair, wouldn't you agree?

13 A Sure.

14 Q Yes. And there's no stop line there, is it?

15 A Not that I can see from this photograph, sir, no.

16 Q Would you think that other photographs might show that  
17 there is a stop line there?

18 A I wouldn't know, sir.

19 Q Okay. If I told you I visited there yesterday morning  
20 and took a whole bunch of photographs, I didn't see a stop  
21 line, would that surprise you?

22 A No, sir.

23 Q Okay. It could be consistent with this picture, there is  
24 no stop line; right?

25 A I wasn't with you, sir, if you say so --

1 Q Pardon?

2 A I wasn't with you when you took the photos.

3 Q Say it again?

4 A If you say there weren't, then there weren't, sir.

5 Q Why did you write there was?

6 A It's synonymous in the same charge, whether you stop from  
7 the stop line or if don't stop for the stop sign. So I  
8 just -- on the day, I can't speak for where my mind was at  
9 that very second for that, but it's the same charge.

10 Q Well, it's not the same charge because if you look at the  
11 transportation article, there's different subsections,  
12 Detective. You're aware of that. There's subsection A,  
13 there's a subsection B, and there's a subsection C, and you  
14 will check whichever one is applicable to the particular stop  
15 in question; isn't that right?

16 A Yes, sir.

17 Q Okay. You chose subsection A, which references a stop  
18 line. And in fact, further on in this Bonds Exhibit No. 1 we  
19 actually see a copy of your citation. And this is your  
20 handwriting, isn't it?

21 A Yes, sir.

22 Q And you said that the driver did fail to stop at the stop  
23 line, l-i-n-e, subsection A, got the right section. But the  
24 fact is, he did not fail to stop at a stop line, did he?

25 A He did, sir.

1 Q He did what?

2 A There was no line, but it's the same charge.

3 Q Therefore, Detective, he did not fail to stop at a stop  
4 line, did he?

5 A Specifically, no, sir.

6 Q Okay. Now, when you look back at this photograph that  
7 the government provided us, do I understand that your  
8 vehicle -- that you're -- see my pen there, Detective?

9 A Yes, sir.

10 Q Was your vehicle pointed the way in which my pen is  
11 presently moving?

12 A I can't recall at this time, sir.

13 Q You cannot recall. So you can't recall today whether  
14 your car was coming this way or whether your car was coming  
15 that way, is that your testimony?

16 A Yes, sir.

17 Q That you can't remember?

18 A I can't recall which way my vehicle was going, sir.

19 Q You can't recall -- and you can't recall because what you  
20 said in direct examination, quote, "a lot of things were going  
21 on"?

22 A That's not the reason, sir.

23 Q I'm sorry?

24 A That's not the reason why I can't remember, sir.

25 Q Why can't you remember?



1 A I just don't recall at this time.

2 Q Can you see -- to make sure the Court understands, if I  
3 am correct, Mr. Bonds is traveling from the direction that my  
4 pen is presently moving; is that correct?

5 A Yes, sir.

6 Q And which way did he turn, did he turn this way, which  
7 would be a left-hand turn; or did he turn this way, which  
8 would be a right-hand turn?

9 A Again, I don't recall at this time, sir.

10 Q You do not recall at this time. Well, let me ask you  
11 this: Would you agree with me that if a person's attempting  
12 to make a right-hand turn, they're going to have a real tough  
13 time trying to see around that corner with these trees  
14 obviously blocking someone's view to make a right-hand turn,  
15 wouldn't that be correct?

16 A Theoretically.

17 Q Theoretically. Isn't it also true that the  
18 transportation article calls for and allows a person to creep  
19 out as far as they can into an intersection before they make a  
20 turn if they can't see unimpeded; is that right?

21 A I don't know that, sir.

22 Q Check subsection C of the same article.

23 THE COURT: Well, if we're going to check it, let's  
24 check it.

25 MR. RUTER: Well, in a second, Your Honor.

1 THE COURT: You gave him an instruction that he  
2 can't carry out if you don't have it in front of him. That's  
3 the problem with building expectations, I'm curious.

4 Q (BY MR. RUTER) You can see, can you not though,  
5 Detective, that there's a lot of trees here obstructing one's  
6 view if they're attempting to make a right-hand turn, isn't  
7 that accurate?

8 A Yes, sir.

9 Q And again, you're not able to tell us whether or not you  
10 were headed in this direction I'm now pointing from, the  
11 bottom up, or whether you're moving from the top down, you  
12 can't recall that; is that right?

13 A No, I cannot, sir.

14 Q So when you saw him, was your vehicle in motion?

15 A Yes, sir.

16 Q And when you saw him, as you're trying to reach back in  
17 the recesses of your mind, can you see his vehicle on your  
18 left side or on your right side, as you're attempting to  
19 recreate what you saw when this event occurred?

20 A Again, I can't recall, sir.

21 Q Would you also agree with me that if you were traveling  
22 in this direction, I'm now pointing from the top of the page  
23 down, you would -- you might have a very difficult time seeing  
24 with precision what it was this car was doing given the fact  
25 that there are several trees there that would obstruct your

1 view?

2 A Sir, could you repeat the question.

3 Q Be happy to. Would you agree with me that if you were  
4 moving in this direction, going from the top of the page down,  
5 that you'd have a difficult time seeing with precision what  
6 the vehicle did because there would be trees obstructing your  
7 view?

8 A I comfortably can't say what I would be feeling or seeing  
9 if I wasn't in that position, sir.

10 Q Okay. Transportation Article 21-707(a) states, and I  
11 quote, Detective: "Unless otherwise directed by a police  
12 officer or traffic control device, the driver of a vehicle  
13 approaching a stop sign at an intersection shall stop at the  
14 near side of the intersection at a clearly marked stop line."

15 That's a quote from the section. Are you with me so  
16 far?

17 A Yes, sir.

18 Q Okay. And we agree that you charged him under that  
19 subsection, 21-707(a), are we not -- we're in agreement  
20 there?

21 A Yes, sir.

22 Q Okay. Subsection B says -- this is the important part of  
23 subsection B: "If there is no clearly marked stop line, then  
24 a driver is to stop before entering any crosswalk," end quote.

25 Did you see any crosswalk here, is there a crosswalk

1 here?

2 A No, sir.

3 Q Okay. Subsection C says: "If there is no crosswalk, a  
4 driver is to stop at the nearest point before entering the  
5 intersection that gives the driver a view of traffic  
6 approaching on the intersecting roadway," end quote.

7 Would you agree with me, Detective, that if Mr. Bonds is  
8 traveling in this direction, and he was, wasn't he?

9 A Yes, sir.

10 Q You remember that much; correct?

11 A Yes, sir.

12 Q All right. And if he were turning right -- and you have  
13 no recollection where he was turning; is that right?

14 A Correct, sir.

15 Q Then he may very well have to come out into this  
16 intersection a little bit to see if there's any oncoming  
17 traffic, true?

18 A Perhaps.

19 Q Pardon?

20 A I said perhaps.

21 Q So given all that, what did you see, what exactly did you  
22 see?

23 A I saw the vehicle fail to come to a stop at the stop sign  
24 and come into the intersection on the roadway.

25 Q I thought on direct examination I heard you say that he

1 came out in the intersection and then he stopped.

2 A Correct.

3 Q Pardon?

4 A Which he came past the stop sign and then came into the  
5 intersection.

6 Q Yes. But I think you testified on direct that when he  
7 got through -- when he failed to stop at the stop sign, he  
8 stopped in the intersection and then he went on.

9 A He rolled through the stop sign. He never came to a  
10 complete stop.

11 Q I may have to ask the court reporter to review what you  
12 said on direct because my recollection was that you said that  
13 he went through the intersection and stopped and then he made  
14 his turn. In other words, your complaint was he didn't stop  
15 in front of the stop sign, he stopped a little bit after the  
16 stop sign and then proceeded on to make his right- or  
17 left-hand turn, of which you can't recall today?

18 A I don't recall making that exact statement, sir.

19 THE COURT: Well, did he ever stop?

20 THE WITNESS: Excuse me, sir?

21 THE COURT: Did he ever stop?

22 THE WITNESS: He came past -- what I can remember  
23 today, sir, he came past the stop sign, came into the  
24 intersection. That's what I observed, and he never came to a  
25 complete stop.

1 Q (BY MR. RUTER) That is not what I believe you said on  
2 direct, but we may have to get that back. That's not what I  
3 recall hearing you say, Detective, on direct examination.

4 A Okay.

5 Q And so what you're not sure of, you're not sure of  
6 whether or not -- and by the way, was your vehicle moving?

7 A Yes, sir.

8 Q Okay. You can't recall which direction you were moving  
9 in, but you do recall that -- now you're telling us you do  
10 recall that you didn't see the vehicle stop at all?

11 A Correct.

12 Q But yet you were able to discern that he failed to stop  
13 at a stop line when there is no stop line?

14 A Correct.

15 Q Now, when -- if you were coming in this direction, I'm  
16 now pointing -- I'm looking at Defense -- rather, Government  
17 Exhibit 21, if you're traveling in this direction from  
18 Cherryland Road, and Mr. Bonds made a right-hand turn, you  
19 would have had to have done a U-turn, wouldn't you, to have  
20 stopped him?

21 A In that situation, perhaps.

22 Q Yeah.

23 A Perhaps in that situation.

24 Q And do you recall whether you did that or not?

25 A No, I do not.

1 Q So you stop him and you ask for his driver's license and  
2 his registration?

3 A Yes, sir.

4 Q And he provides them to you?

5 A Yes, sir.

6 Q You discovered that his driver's license was suspended?

7 A Yes, sir.

8 Q And when you discovered that, did you come back to his  
9 vehicle and advise him that he was suspended, did you say  
10 "you're suspended"?

11 A At some point during the course of the stop, yes. I  
12 don't know exactly when that happened, but yes, at some  
13 point.

14 Q Well, you told us that you -- there came a time when you  
15 arrested him?

16 A Correct.

17 Q And do you recall how long after it was that you noted  
18 that he was suspended that the arrest took place?

19 A No, I don't recall how much time.

20 Q Do you always arrest any driver who you -- that you  
21 discovered is driving on a suspended license?

22 A I have so many stops, I can't recall -- not every time.

23 Q You're not required to arrest somebody --

24 A No, we have discretion, sir.

25 Q Now, there's -- it's an incarcerable offense; right?

1 A Yes.

2 Q But you're not required to actually formally arrest  
3 somebody; isn't that right?

4 A Yes.

5 Q In this case you were not going -- initially going to  
6 arrest Mr. Bonds, were you?

7 A I don't know that, sir.

8 Q Well, don't you recall his calling his family, you  
9 allowed him to make a phone call to his father?

10 A No, I don't recall that, sir.

11 Q You don't recall his father coming down to the scene of  
12 the stop and speaking with you personally about taking away  
13 the vehicle?

14 A No, I don't recall that, sir.

15 Q You don't recall that at all?

16 A No.

17 Q But you do recall that he told you why he had a gun in  
18 his car?

19 A That's something that sticks out in your mind pretty  
20 well, sir.

21 Q It sticks out in your mind so much, Detective, that there  
22 is no possible way you'd forget to put it in a statement of  
23 probable cause, would you?

24 A No, I forgot, sir.

25 Q You forgot. But you said that's something that would



1 stick in your mind, it stuck in your mind today, didn't it?

2 A Yes, sir.

3 Q It didn't stick in your mind when you wrote your police  
4 report, did it?

5 A No, sir.

6 Q It didn't stick in your mind when you wrote a statement  
7 of probable cause, did it?

8 A No, sir.

9 Q When did you tell the government that that all  
10 happened?

11 A During the interview, sir.

12 Q Pardon?

13 A During my conference with them, sir.

14 Q When was that?

15 A Last week, sir.

16 Q Last week. So to your knowledge, the first time the  
17 United States Government learned about this statement made by  
18 Mr. Bonds was when you told them last week?

19 A I believe so, sir, yes.

20 Q Would you be surprised that the first time that I heard  
21 it was in this courtroom?

22 A No, sir.

23 Q Okay. And yet that's something that stuck out in your  
24 mind?

25 A Yes, sir.

1 Q You do not recall at all, other people coming to the  
2 scene of the stop, ready to take the vehicle away?

3 A No, sir.

4 Q You don't recall that?

5 A No, sir.

6 Q You do not recall this man making a phone call?

7 A No, sir.

8 Q So Detective, you -- we need to go back to your statement  
9 of probable cause. The statement of probable cause is  
10 identical to the police report, isn't it?

11 A Yes, sir.

12 Q The statement of probable cause, by the way, you actually  
13 swear that under the punishment of perjury, don't you?

14 A Yes, sir.

15 Q And we all can agree that -- let me ask another question,  
16 do you think it's significant or important, as you testified,  
17 when Mr. Bonds told you or admitted that he knew the gun was  
18 there?

19 A Yes, sir.

20 Q Did you think that was significant or important on the  
21 day that he told that to you?

22 A I can't speak to my thoughts on that day, but I forgot to  
23 put it in unfortunately.

24 Q But Detective, I'm asking you about your thoughts that  
25 day.

1 A Sir, could you repeat --

2 Q Not your thoughts today, your thoughts on October 23rd,  
3 2013, is what I'm asking about.

4 A Could you repeat what you're asking me, sir.

5 Q Sure. On October 23rd, 2013, did you not think it was  
6 legally and factually significant that Mr. Bonds allegedly  
7 told you that he knew that gun was in that vehicle?

8 A On that day, on October 23rd, 2013, did I think it was  
9 important to put it in there, sir?

10 Q Yes, sir.

11 A Again, I can't answer to my thought process at that  
12 time.

13 Q Detective, you ended up charging the man with possession  
14 of a handgun?

15 A Yes, sir.

16 Q How could you not believe it was the centerpiece of what  
17 should have been in your statement of probable cause?

18 A I don't know, sir.

19 Q Could it be because he didn't say it?

20 A No, sir.

21 Q I see. Now, when we go to the third paragraph of this  
22 statement of probable cause, you indicate that while  
23 inventorying the vehicle for valuables, so now what you're  
24 telling the world is that whatever search you were doing, you  
25 were doing an inventory search; correct?

1 A Yes, sir.

2 Q You were doing an inventory search because the only  
3 probable cause you had to believe that any offense was  
4 committed, in your mind, was number one, some kind of a  
5 traffic violation for going through a stop line, which is what  
6 you wrote; correct?

7 A It was a traffic stop, yes, sir.

8 Q And number two, was driving on a suspended license?

9 A He was arrested for that, yes, sir.

10 Q Therefore, you would not have probable cause to go  
11 searching the entirety of the vehicle, tearing up things and  
12 trying to find actual evidence of crime; correct?

13 A It was an inventory search to protect both myself and  
14 Mr. Bonds.

15 Q Yes, which is what you put in the statement of probable  
16 cause. And then you say that, "I recovered a .357 magnum  
17 silver Ruger revolver fully loaded," and so on, "located under  
18 the rear bench on the passenger side of the vehicle."

19 So Detective, what I've been doing is going on the  
20 internet looking for a 1998 Honda the last few weeks, and I  
21 couldn't find any that had any space underneath the bench  
22 seat, as you described it in the statement of probable cause.  
23 And that's because this car doesn't have a rear bench seat  
24 that you can stick anything under; isn't that right?

25 A That's incorrect, sir. If you lift the pad where a

1 passenger would be seated, it's actually removable. And that  
2 seat was loose before I even touched it.

3 Q So how loose was it?

4 A It was loose enough that the -- it was accessible.

5 Q Yeah, because you forced it up?

6 A No, sir.

7 Q You picked it up?

8 A No, sir. Like I just said, it was already loose before I  
9 even touched it.

10 Q Could you peek inside it and see a gun?

11 A I don't believe so.

12 Q No. But when you read what you wrote, Detective, don't  
13 you agree with me that it sounds as if you saw this particular  
14 weapon in what we would call in "plain view," wouldn't you  
15 agree with that?

16 A No, sir. I didn't say "plain view" in my probable cause,  
17 sir.

18 Q Yes. We know that. You also didn't tell us that he  
19 admitted that he knew the gun was there; right?

20 A Correct.

21 Q And you also didn't tell us that he said that he had it  
22 there and didn't want his children to get it, is that what you  
23 testified to?

24 A Yes, sir.

25 Q So we know all that, but when it says located under the

1 rear bench, it wasn't located under the rear bench, was it?

2 A Yes, it was, sir.

3 Q It was located under the back seat, which you had to lift  
4 up; isn't that right, Detective?

5 A Correct.

6 Q Okay. So Detective, you understand clearly the  
7 significance and the importance of writing reports accurately;  
8 right?

9 A Yes, sir.

10 Q If I understand it, when you went to work for the Prince  
11 George's County Police Department, you were accused by the  
12 department of making a couple false statements.

13 A No, sir, misrepresentation of facts.

14 Q I'm sorry?

15 A Misrepresentation of facts, sir.

16 Q So a misrepresentation of fact, is that different from  
17 making a false statement?

18 A Yes, sir.

19 Q Tell us how that is.

20 A I can't really speak to what the department decides the  
21 difference is. A false statement is an egregious lie.  
22 Misrepresentation of facts is the department's interpretation.

23 Q I'm referring to an internal affairs investigation where  
24 you were the respondent; right?

25 A Yes, sir.

1 Q And it dealt with a stop that occurred in December of  
2 2014; correct?

3 A Yes, sir.

4 Q And you had advised not one, not two, but I think three  
5 different police officers as to your version of events that  
6 occurred on that evening; correct?

7 A Correct.

8 Q And after -- and then thereafter, you gave two separate  
9 statements on -- not under oath, but under the LEOBR, you were  
10 interviewed under the Law Enforcement Officers Bill of Rights,  
11 and you gave a recorded statement; correct?

12 A Correct.

13 Q And it was all reduced to a transcript; correct?

14 A Yes, sir.

15 Q And you gave your version of what happened in terms of  
16 your pursuit of a vehicle on a certain night, which resulted,  
17 evidently, in a very nasty car accident between that vehicle  
18 and another vehicle that were hit head on?

19 A Correct.

20 Q You had told your superiors and investigators that you  
21 were not in pursuit of one of those vehicles?

22 A Is that a question, sir?

23 Q It is a question, you told them --

24 A Yes.

25 Q And there were witnesses and cameras, five cameras, that

1 controverted your statement; is that right?

2 A That's not correct, sir.

3 Q What is correct?

4 A On the day in question, a vehicle fled from me, and  
5 evidence showed that at the time of the crash, the suspect  
6 vehicle was traveling 97 miles per hour. I was driving 45  
7 miles per hour, I was a half mile back, and my lights and  
8 sirens were off.

9 Q There were findings made in that case; correct?

10 A Correct.

11 Q And they were actually sustained by full board review,  
12 and you were found to have been in violation of two things I  
13 want to talk about briefly here. It's charge number two.

14 MR. RUTER: And Your Honor, I would move to  
15 introduce this as Bond's No. 2.

16 MS. HOFFMAN: Objection, Your Honor. May we  
17 approach?

18 THE COURT: Yes.

19 (Bench conference on the record.)

20 MS. HOFFMAN: So --

21 THE COURT: You've got to speak up so the reporter  
22 can hear you on that mike.

23 MS. HOFFMAN: We submitted a letter to Your Honor on  
24 Friday and it's our position that there's really no -- the  
25 defendant Mr. Bonds stipulated through his counsel under oath



1 during a state guilty plea that he was pulled over for a  
2 traffic violation. So probing Detective Neptune on his  
3 character for truthfulness on a completely separate unrelated  
4 incident is a little far afield here, I think. Using  
5 extrinsic evidence to cross-examine him, I think it's even  
6 farther afield. We'd like to preclude admission of the  
7 underlying file. He maintains that he didn't misrepresent any  
8 facts. There's a 200-page IAD file. We don't want this to  
9 become a trial within a trial. We think that --

10 THE COURT: Well, what did the police department  
11 conclude?

12 MS. HOFFMAN: It was a sustained finding of  
13 misrepresentation of fact. He maintains that he didn't  
14 misrepresent facts. However, he, of course, acknowledges that  
15 the finding was sustained. He brought it to our attention.  
16 He sent us the entire file.

17 MR. MARTINEZ: I think we might propose, Your Honor,  
18 Mr. Ruter is free to question and extract the confession which  
19 I think he's prepared to give, that there were sustained  
20 findings. I think what we propose is for the Court to leave  
21 it at that and that the extrinsic evidence has some  
22 applicability here.

23 THE COURT: Are we talking about in this hearing or  
24 are we talking about at trial?

25 MR. MARTINEZ: Well, at this hearing. I certainly

1 recognize rules of evidence don't strictly apply, but I still  
2 think the policy under 608(b) and using extrinsic evidence  
3 should still be of some weight. And all I'm saying is that if  
4 the detective acknowledges there were sustained findings, I  
5 think it's appropriate to leave it at that and not admit --

6 THE COURT: I think there's some value though in  
7 seeing how he deals with the issue when he's being  
8 cross-examined and whether or not he's forthright about it, or  
9 whether he is not. And I take some value from what Mr. Ruter  
10 has been doing in terms of not just the substance of what the  
11 trial board found, but whether the witness readily  
12 acknowledges that circumstance, and if he doesn't, why doesn't  
13 he, you know, perhaps he's got his theory on it and so forth.  
14 So I don't know that I actually need the document itself.

15 MR. RUTER: I'd be happy to read what the finding  
16 is, Judge.

17 THE COURT: I think that that's fair and  
18 appropriate. But that's really where the focus on this should  
19 be. Doesn't sound like there's any dispute between the  
20 parties as to what the finding was.

21 MR. RUTER: I agree.

22 THE COURT: Let's just see how he -- you're entitled  
23 to test before me, the fact finder, you know, how this guy  
24 manages information like this. And whether he, you know,  
25 allowing me to form an impression about whether he is

1 essentially truthful or essentially not truthful.

2 MR. MARTINEZ: Agreed.

3 MS. HOFFMAN: I think that's fair, Your Honor.

4 Thank you.

5 (The following proceedings were had in open court.)

6 THE COURT: You may continue, Mr. Ruter.

7 Q (BY MR. RUTER) Detective, you had said a moment ago in  
8 your attempt to explain what had happened in December of 2014  
9 that this one vehicle was traveling at approximately 90 miles  
10 an hour, and you were traveling at approximately 50 miles.

11 Did I hear you say that?

12 A I said 45 miles per hour myself, sir, and the suspect was  
13 going 97 miles per hour at the time of the accident.

14 Q Okay. And you agree with me, do you not, however, that  
15 there were five cameras located on different commercial  
16 buildings that showed that you were only three seconds behind  
17 that vehicle that's going over 50 miles an hour faster than  
18 you during this pursuit, you recall all that, do you not?

19 A No, sir, at the time --

20 Q You don't recall -- you don't recall, Detective,  
21 testimony about five different cameras that had time sequences  
22 on them that saw the Lexus vehicle speeding down Beech Road in  
23 Prince George's County, and you in pursuit with a marked  
24 vehicle, three seconds behind it on one of those clips, four  
25 seconds behind it in another clip, on different buildings, you

1 don't recall that, sir?

2 A Sir, the cameras were placed at different spots on the  
3 roadway.

4 Q Yes.

5 A Initially off the turn, when the vehicle began to  
6 increase speed, that was my closest time I was at the vehicle.  
7 And I believe the first camera showed me at three seconds.  
8 But at that time we were both going approximately the same  
9 speed coming off of a turn, so we were both going well under  
10 his 97 miles per hour.

11 Q So your testimony now is, he was picking up speed later  
12 on, that's when he got to 90 miles an hour, before he hit  
13 another car head on; right?

14 A Yes, sir, that's when he was fleeing and I was just on  
15 the same road going the same direction.

16 Q Those issues were thoroughly vetted before a disciplinary  
17 board in Prince George's County; correct?

18 A Yes, sir.

19 Q And if I understand it, you were -- findings were  
20 sustained as follows: That the respondent, police officer  
21 Jamal Neptune, did, on or about June the 4th, 2015 -- this is  
22 six months after the event; right?

23 A Yes, sir.

24 Q Okay. At 6707 Groveton Drive, Clinton, Maryland, that's  
25 where you were interviewed by other police personnel;

1 correct?

2 A That's the internal affairs division, sir.

3 Q Yes, intentionally misrepresent facts to Corporal Kyle  
4 Butterharm (phonetic) concerning his actions in a vehicle  
5 pursuit that occurred on or about December 29th, 2014, in  
6 violation of Prince George's County Code Section 18-160, which  
7 says, "No member of the police department under any  
8 circumstances shall make any false official statement or  
9 intentional misrepresentation of fact." That was the finding;  
10 correct, Detective?

11 A Yes, sir.

12 Q Do you take issue with that?

13 A No, sir.

14 Q Okay. You didn't appeal the decision, did you?

15 A I did, sir. I took it to trial board, and I'm working on  
16 going through an appeal now, sir.

17 Q Pardon?

18 A I'm exploring the options to go through an appeal right  
19 now, sir.

20 Q Okay. This finding occurred in February of 2017, but  
21 you're still exploring your options?

22 A Yes, sir. If you recall the date, the incident occurred  
23 December 2013, and I wasn't even -- didn't get a conclusion  
24 until 2016, so unfortunately these processes move kind of  
25 slowly.

1 Q I see. And then charge No. 3 was sustained, which says  
2 that the respondent, police officer Jamal Neptune, on or about  
3 December 29th, 2014, in the area of the 5000 block of Beech  
4 Road, Temple Hills, Maryland intentionally misrepresented  
5 facts to Corporal Davon Thompson concerning his actions in a  
6 vehicle pursuit that he was involved on that day, in violation  
7 of Prince George's County Code Section 18-160: "No member of  
8 the police department under any circumstances shall make any  
9 false official statement or intentional misrepresentation of  
10 facts." That was sustained, was it not?

11 A Yes, sir.

12 Q And you gave your version of events, did you not,  
13 Detective, because you did not want your authorities believing  
14 you were making a hot pursuit outside of your jurisdiction;  
15 isn't that right?

16 A I was inside of my jurisdiction, sir, and I just gave my  
17 recollection of what occurred.

18 Q And then charge No. 1, which was sustained is, "Officers  
19 may only engage in vehicle pursuits in the county and  
20 neighboring jurisdictions outside of the county if there's  
21 reason to believe that the following suspect is committing,  
22 has committed, or attempted to commit any of the following:  
23 homicide, contact shooting, armed robbery, armed carjacking."

24 You were found not to have been engaged in any of those;  
25 isn't that right?

1 A Correct, sir.

2 MR. RUTER: No further questions. Thank you.

3 THE COURT: Redirect. One second.

4 Ms. Hoffman.

5 REDIRECT EXAMINATION

6 BY MS. HOFFMAN:

7 Q Detective Neptune, I'd like to show you again  
8 Government's Exhibit 21. Do you know when this photograph was  
9 taken?

10 A No, ma'am.

11 Q If I told you it was a Google maps image from 2011, would  
12 you have any reason to disagree?

13 A Actually, I can see on the top left it says 2011. Yes,  
14 ma'am, I see.

15 Q Is it possible the intersection looked different two  
16 years later in 2013 when the stop of Joseph Bonds occurred?

17 A Yes, ma'am.

18 Q Do you know for sure whether or not there was a stop line  
19 at that intersection on October 23rd of 2013?

20 A Based on this photograph, no, ma'am.

21 Q Do you know for sure whether those trees were there in  
22 2013?

23 A Again, based on this photograph, no, ma'am.

24 Q You testified on direct examination and on  
25 cross-examination that Mr. Bonds's vehicle rolled into the

1 intersection without stopping; is that correct?

2 A Yes, ma'am.

3 Q Can you point in this photograph to approximately where  
4 the car was when it slowed down?

5 A Just point right here, ma'am?

6 Q Yeah, you can use your finger to touch on the screen  
7 here.

8 A As I could see -- I could see it past the sidewalk  
9 there.

10 Q Did it ever come to a complete stop?

11 A No, it continued to roll through, ma'am.

12 Q Was what you saw consistent with someone --

13 THE COURT: Okay. Counsel can approach.

14 (Bench conference between Court and court reporter.)

15 THE COURT: We're back on the record. The reporter  
16 will turn to her notes recording the direct testimony of the  
17 witness, page 43, line 9, and will read back from line 9 to  
18 line 23.

19 Madame Reporter, you may begin. Line 8 actually.

20 (Page 46, line 20 through page 47, line 9, of the  
21 final, certified, transcript, was read by the court reporter.)

22 THE COURT: Thank you, Madame Reporter.

23 The witness will be brought back into the courtroom.

24 Ms. Hoffman, you may continue your redirect  
25 examination.



1 Detective Neptune has rejoined us, you remain under  
2 oath.

3 Ms. Hoffman, you may continue.

4 Q (BY MS. HOFFMAN) Detective Neptune, I believe on direct  
5 examination you testified that you saw -- you observed the car  
6 fail to stop at the stop sign, roll into the intersection  
7 before coming to a stop; is that right?

8 A Correct.

9 Q Do you recall whether the vehicle came to a complete  
10 stop, what exactly did you see?

11 A On the day of the traffic infraction, I recall the  
12 vehicle not stopping at the stop sign and coming through the  
13 intersection where I could see it. It didn't come to a  
14 complete stop where the vehicle was rocking backwards. It was  
15 already in the intersection, and it continued to roll through.  
16 It did slow down when it came to the intersection, but it  
17 continued to roll through without coming to an absolute  
18 complete stop.

19 Q And was it at that point you turned on your emergency  
20 lights?

21 A Correct.

22 Q Was what you saw consistent with someone trying to look  
23 around the corner to see whether there was any oncoming  
24 traffic or someone who just blew through a stop sign?

25 MR. RUTER: Objection.

1 THE COURT: Sustained. You may rephrase your  
2 question so it's not leading.

3 Q (BY MS. HOFFMAN) Was what you saw consistent with  
4 someone trying to look around the corner to see whether there  
5 was oncoming traffic?

6 MR. RUTER: Objection, Your Honor.

7 THE COURT: I'll allow that.

8 MR. RUTER: He can't know.

9 THE COURT: He can have an opinion on that.  
10 Overruled.

11 A The vehicle went through the stop sign and into the  
12 intersection. It committed the traffic infraction, so I  
13 pulled it over as a result.

14 Q (BY MS. HOFFMAN) Could you tell at the time whether the  
15 driver was attempting to see around the corner?

16 A Not at that time, I couldn't tell that specific --

17 MR. RUTER: Objection.

18 THE COURT: Well, the question was, could he tell.

19 MR. RUTER: I'm sorry, Judge?

20 THE COURT: The question was, could he tell. Could  
21 he tell?

22 MR. RUTER: Withdrawn.

23 A Ma'am, I could not tell if somebody was just trying to  
24 simply look around the corner at that time.

25 Q (BY MS. HOFFMAN) Did you believe you had probable cause

1 to pull him over for running a stop sign?

2 A Yes, ma'am, he had gone through the stop sign.

3 THE COURT: Did he believe -- I mean, it's  
4 overruled.

5 Q (BY MS. HOFFMAN) Is it a violation of the Maryland  
6 traffic code to run a stop sign if there is not a clearly  
7 marked stop line in the road?

8 A Yes, ma'am.

9 Q Is it possible that you cited him for failure to stop at  
10 a stop line when you meant failure to stop at a stop sign?

11 MR. RUTER: Objection.

12 THE COURT: Yes. Sustained.

13 Q (BY MS. HOFFMAN) What citation did you typically use  
14 when someone failed to stop at a stop sign?

15 MR. RUTER: Objection. Relevancy.

16 THE COURT: Overruled.

17 A At that time I was using the stop line, ma'am.

18 Q (BY MS. HOFFMAN) And is that part of the same section of  
19 the Maryland traffic code as failure to stop at a stop sign?

20 A Yes, ma'am.

21 Q Is the punishment for both infractions the same?

22 A Yes, ma'am.

23 Q And both are offenses for which someone can be pulled  
24 over?

25 A Yes, ma'am.

1 Q I'd like to show you Government's Exhibit 22. And this  
2 is the towed vehicle report that you completed on October 23rd  
3 of 2013; correct?

4 A Yes, ma'am.

5 Q And can you see where it says who the registered owner of  
6 the vehicle is?

7 A Yes, ma'am.

8 Q Who is it?

9 A A Ms. Tameeka Gilliam.

10 Q And was she present at the scene when you made this  
11 stop?

12 A No, ma'am.

13 Q I'd like to show you Government's Exhibit 23. Can you  
14 read what it says at the top of this document?

15 A Baltimore Police Department General Order, then it says  
16 I-2, procedures governing the use of pushing/towing  
17 vehicles.

18 Q And is this the policy that was in place at the time that  
19 you made this traffic stop, to the best of your knowledge?

20 A Yes, ma'am.

21 Q I'd like to flip a page here. I'm showing you page --  
22 it's I-24 of this document, can you read the highlighted text  
23 there?

24 A Note: In all other cases, not including DWI, the vehicle  
25 driven by the arrested driver may only be released by the

1 arresting officer to the owner/co-owner of the vehicle or a  
2 licensed driver, with the consent of owner/co-owner.

3 Q Were you permitted under this policy to release a vehicle  
4 whose operator had been arrested to a licensed driver without  
5 the consent of the owner or co-owner?

6 A No, ma'am.

7 Q And was the owner or co-owner there at the scene?

8 A No, ma'am.

9 THE COURT: And did the defendant consent to the car  
10 being given to somebody else?

11 THE WITNESS: That question never arose, sir.

12 Q (BY MS. HOFFMAN) Well, it says here that the vehicle  
13 driven by the arrested driver may only be released by the  
14 arresting officer to the owner or co-owner of the vehicle or a  
15 licensed driver with the consent of the owner or co-owner; is  
16 that right?

17 A Yes, ma'am.

18 Q Was Joseph Bonds the owner or co-owner of the vehicle?

19 A No, ma'am.

20 Q Did you believe you were complying with this policy when  
21 you had it towed to city yard?

22 A Yes, ma'am.

23 THE COURT: Well, was there anybody else there  
24 willing to take the car?

25 THE WITNESS: Mr. Bonds was the only occupant of the

1 vehicle, sir.

2 THE COURT: And nobody else arrived or showed up and  
3 said I'll take the car?

4 THE WITNESS: No, sir.

5 THE COURT: It was just the two of you, that was the  
6 total interaction?

7 THE WITNESS: Myself, Mr. Bonds, and then assisting  
8 officers, those are the only people I remember on scene.

9 THE COURT: But there weren't any friends,  
10 relatives, anybody else who came to the scene, and Mr. Bonds  
11 said, look, let them take the car?

12 THE WITNESS: No, sir. There was no one else that I  
13 can recall now.

14 Q (BY MS. HOFFMAN) Even if there had been other licensed  
15 drivers who came to the scene, would you have been authorized,  
16 under Baltimore Police Department's policy at the time to  
17 release the vehicle to them without the consent of the actual  
18 owner of the vehicle?

19 A No, ma'am. If I did that, I would be in violation of my  
20 general orders.

21 Q Now, you mentioned on direct examination --

22 THE COURT: So I'm driving in Baltimore, it's my  
23 wife's car, only she's on the registration. You pull me over  
24 and find that I'm suspended, so I'm being arrested. My son  
25 comes around the corner and says, that's fine, I'll take the

1 car. You wouldn't let him take the car?

2 THE WITNESS: So if your wife is the sole registered  
3 owner of the vehicle and she was in the vehicle with you and  
4 you were arrested --

5 THE COURT: No, no, she's not anywhere.

6 THE WITNESS: Oh, she's not on scene.

7 THE COURT: -- at all, her only involvement is she's  
8 on the registration.

9 THE WITNESS: Unfortunately, due to the general  
10 order, she's the only one that could give me consent.

11 THE COURT: Next question.

12 Q (BY MS. HOFFMAN) Detective Neptune, you mentioned on  
13 direct examination that the rear bench of the Honda was  
14 loose?

15 A Yes, ma'am.

16 Q And what did you mean when you said rear bench?

17 A The rear passenger seat.

18 Q And is the seat sometimes referred to as a bench?

19 A Yes, ma'am.

20 Q Did you believe it was possible that valuables could be  
21 stashed under that bench?

22 A Yes, ma'am.

23 MR. RUTER: Objection, Your Honor.

24 THE COURT: Overruled.

25 Q (BY MS. HOFFMAN) And why was that?

1 A Due to my experience, valuables can and often do fall  
2 behind the seat and underneath the seat.

3 Q And were you required by the Baltimore Police Department  
4 policy at the time to search the car thoroughly for  
5 valuables?

6 A Yes, ma'am.

7 Q Were you complying with that policy when you searched  
8 under the rear bench of the vehicle?

9 A Yes, ma'am.

10 Q Mr. Ruter asked you about a Prince George's County Police  
11 Department IAD proceeding on cross-examination. How long have  
12 you been a police officer, Detective Neptune?

13 A I became a police officer in April of 2012, and I'm  
14 currently one today, so five and a half years.

15 Q Have you ever had a sustained IAD violation other than  
16 the one Mr. Ruter asked you about?

17 A No, ma'am.

18 Q Have you, in fact, received commendations for your work  
19 as a police officer from the Prince George's County Police  
20 Department?

21 A Yes, ma'am.

22 Q Can you give us some examples?

23 A I've been awarded officer of the month on three different  
24 occasions. And I was also -- I was awarded a commendation and  
25 also the District Commander's Award.



1 Q And what is that award given for?

2 A The District Commander's Award is given by the district  
3 commander in reference to some extraordinary act by an  
4 officer.

5 Q Did you feel you were treated fairly in the Prince  
6 George's County's IAD proceeding that Mr. Ruter asked you  
7 about?

8 MR. RUTER: Objection.

9 THE COURT: Well, as though we don't know the answer  
10 to that question. Overruled. You can answer.

11 A No, ma'am, I did not feel I was treated fairly.

12 Q And why was that?

13 A Due to the facts that were brought in reference to my  
14 defense, I believe that they were overlooked.

15 MS. HOFFMAN: All right. I have no further  
16 questions for the witness.

17 THE COURT: Thank you. You may step down,  
18 Detective.

19 Any other witnesses on this issue, Ms. Hoffman?

20 MS. HOFFMAN: No, Your Honor.

21 THE COURT: All right. Mr. Ruter, do you have  
22 witnesses?

23 MR. RUTER: I do not. Thank you.

24 THE COURT: Okay. So I'll hear argument, but let's  
25 just cut to the chase. We've got two problems here, one for

1 each side. Mr. Ruter, if there is a violation that justifies  
2 police action, and if the Court concludes that the violation  
3 did occur, but also concludes that the violation might,  
4 technically speaking, be different from the one for which the  
5 defendant was cited, does that change anything?

6 MR. RUTER: No, I think the case law --

7 THE COURT: The question is whether or not an  
8 officer could lawfully stop somebody. And if there was a  
9 reason why the officer lawfully could stop the person, it's  
10 just that it's different from the reason that the officer  
11 cited or believed.

12 MR. RUTER: Only defense attorneys, Your Honor, get  
13 punished for not having the right reason in their arguments,  
14 police officers do not. The fact -- the case law is very  
15 clear that if they're right on one thing, but they wrote down  
16 something else, that does not change the fact that the -- if  
17 the something else gives them a reason to arrest someone, they  
18 can still do that.

19 THE COURT: Precisely. Mr. Ruter, one of the things  
20 I appreciate about you is candor, which I always get from you.  
21 And now we'll turn to the government, since candor is the  
22 topic of the moment. Ms. Hoffman.

23 MS. HOFFMAN: Well, I think first --

24 THE COURT: What am I supposed to do about an  
25 officer who first gets himself apparently in quite a jam with

1 his agency in very -- in a very serious case, such that  
2 they're conducting an investigation that goes so far as to  
3 collecting building surveillance camera tape. And then at the  
4 conclusion of which, at least at this point, is that the  
5 officer was -- that he intentionally -- intentionally --  
6 misrepresented facts? That's problem number one. And then  
7 problem number two, in testimony in front of me, on a fact of  
8 some importance, not a dispositive fact by itself, but a fact  
9 of some importance, not an immaterial fact, directly  
10 contradicts himself, directly. What credibility am I to  
11 afford him?

12 MS. HOFFMAN: Well, I think we have to back up a  
13 minute and look first to the fact that the defendant Joseph  
14 Bonds pleaded guilty to this offense in state court. More  
15 importantly than that, he did stipulate through counsel that  
16 he was pulled over for a traffic violation. So I think we  
17 have to start there. That's some evidence on the scale  
18 leaving us to believe that Detective Neptune did lawfully stop  
19 Joseph Bonds for a traffic violation.

20 Now, turning to this case, I think -- I don't  
21 entirely agree that he did contradict himself. I do see that  
22 on direct examination -- I think what he meant to say is that  
23 the car rolled out into the intersection, it started to stop,  
24 possibly because he saw a police officer there, and then  
25 continued turning on.

1 THE COURT: I didn't hear "started to stop." I  
2 heard "stopped." Did you hear something different from that  
3 when Ms. Asif read back the record?

4 MS. HOFFMAN: No, I think that's correct, Your  
5 Honor. That is what he said. I believe that the question  
6 here is whether or not Detective Neptune had probable cause to  
7 stop for a traffic violation, so whether or not he was  
8 ultimately correct that a traffic violation occurred doesn't  
9 matter. He believed that he had probable cause to stop the  
10 car for a traffic violation because he saw Joseph Bonds blow  
11 through a stop sign. That was clearly a violation of the  
12 Maryland traffic code.

13 THE COURT: The whole process that we conduct in  
14 criminal cases is dependant upon the integrity of police  
15 officers and their being scrupulously honest, honest with  
16 exactitude. And when a shadow is cast on that question, we've  
17 got a big problem. I wasn't out at that intersection in  
18 Cherry Hill, nor was anybody else in this courtroom except the  
19 defendant and the officer. I better be able to rely on the  
20 credibility of the officer. If I can't, well, if I can't rely  
21 on his credibility with respect to details like whether or not  
22 the vehicle stopped or didn't stop, why should I still rely on  
23 the overall premise, which was that there was a traffic  
24 violation at all? Why should I?

25 MS. HOFFMAN: In part because the defendant himself

1 admitted that under a -- through counsel in a state guilty  
2 plea proceeding.

3 THE COURT: Mr. Ruter, what do you say about that?

4 MR. RUTER: You may not want to hear everything I've  
5 told the government about that, Judge, but then again,  
6 maybe --

7 THE COURT: Well, just use language that's  
8 appropriate for court.

9 MR. RUTER: Your Honor, without in any -- I'm as serious about  
10 this as I can possibly be. As I told Mr. Martinez and Ms.  
11 Hoffman, I said, you know, it is a -- it's a legal fiction,  
12 Judge Bredar, and we all know it in this courtroom, that when  
13 people go into a court being charged with some offense,  
14 especially in the Baltimore City Circuit Court, if they get to  
15 go home that day, they would admit they shot Jimmy Hoffa. And  
16 that is a fact. Now I recognize Rule 801(d)(A)(1) (sic), I  
17 believe that's the rule, is valid and this court uses it all  
18 the time. I'm well aware of that, but to use that as a  
19 linchpin is being quite disingenuous. This guy got a  
20 two-year, I think, suspended jail sentence. And that's why  
21 people plead guilty in the Baltimore City Circuit Court, not  
22 because of the statement of facts, Judge. I doubt this guy  
23 even heard them

24 THE COURT: What kind of a court am I running if, A,  
25 I can't believe the police officers, on one hand, we already

1 discussed that with the government; now from the defense side  
2 I can't give significance to information and evidence that the  
3 rules of evidence say by rule that I am to accredit?

4 MR. RUTER: I'm going to solve that problem, Your  
5 Honor --

6 THE COURT: I hope you can, because this is a real  
7 problem.

8 MR. RUTER: Because the statement of facts -- the  
9 statement of facts he pled guilty to say he was stopped for a  
10 traffic violation. Yes, he was stopped. He didn't admit that  
11 he committed a traffic violation.

12 THE COURT: Then what crime did he admit to?

13 MR. RUTER: To having a handgun.

14 THE COURT: Whatever happened to the driving under  
15 suspension charge?

16 MR. RUTER: Judge, I don't know if that even  
17 proceeded. I don't recall. I don't think that he was -- he  
18 pled guilty to that.

19 THE COURT: And the sign, stop line, stop whatever  
20 it is, what happened to that?

21 MR. RUTER: I saw no -- in the discovery I saw no  
22 disposition on those two charges. But I'm not being -- I'm  
23 not playing footloose and fancy free with the statement of  
24 facts. You have the statement of facts. The government  
25 outlined them in their answer. And all that he admitted to

1 was that he was stopped for a traffic violation. He did not  
2 admit that he committed the traffic violation. He was stopped  
3 for a traffic violation, but he didn't say that he, in fact,  
4 was guilty of it. He pled guilty to the gun charge. So  
5 that's the answer to the dilemma you have about who do I  
6 believe and who I don't believe.

7 THE COURT: Recess until 2:00 o'clock.

8 (A recess was taken.)

9 THE COURT: Good afternoon. Be seated, please. The  
10 government wants to put something on the record.

11 MS. HOFFMAN: Thank you, Your Honor. Your Honor, we  
12 have talked it over with supervisors and in light of the  
13 Court's concerns about some of the inconsistencies that came  
14 out during the witness's testimony, we've told Mr. Ruter we're  
15 willing to stipulate that we're not going to introduce the gun  
16 recovered from Mr. Bonds on October 23rd, 2013, in evidence at  
17 trial. We don't believe we need the gun. We are planning to  
18 go forward with introducing Mr. Bonds's guilty plea to  
19 possessing the firearm in question. But we think the  
20 stipulation moots Mr. Bonds's motion to suppress the  
21 evidence.

22 THE COURT: Do you agree, Mr. Ruter, it moots it?

23 MR. RUTER: Your Honor, I don't think so. And  
24 ordinarily, Your Honor, it would. But I'm not involved in  
25 this case except for this motions hearing, as the Court's well

1 aware. And I had questioned whether or not should the Court  
2 rule that this stop and this seizure were unconstitutional,  
3 that it may in some way affect the ability of the government  
4 to introduce the guilty plea on the very same charges that  
5 occurred in state court.

6 Now, I know you already ruled, Judge Bredar, but you  
7 ruled -- I think the reasoning given by Mr. Faison, whose  
8 motion was the one, the motion in limine actually outlined in  
9 the argument, it was adopted by Mr. Solomon, had to do with  
10 had he known by pleading guilty to a gun in state court, it  
11 very much could in effect be an equivalent to a guilty plea in  
12 a federal gang-related type case, you found that was not  
13 persuasive and you ruled against them.

14 I don't know what the status of the law is, Judge  
15 Bredar, on whether or not if you were to rule in favor of  
16 Mr. Bonds in this motion, if that could have some adverse  
17 effect on the government's ability to introduce at trial the  
18 very act which you have found to be constitutionally  
19 impermissible, so --

20 THE COURT: If I were to so find.

21 MR. RUTER: Of course, Judge, I'm being very  
22 presumptuous.

23 THE COURT: Somebody would have to file a motion  
24 seeking to exclude admission of the conviction you're  
25 referring to.



1 MR. RUTER: Judge, I think in effect, the motion in  
2 limine --

3 THE COURT: That I ruled on.

4 MR. RUTER: That you ruled on, that I read, may --

5 THE COURT: These circumstances weren't before the  
6 Court in relation to that motion.

7 MR. RUTER: That's correct.

8 THE COURT: And so that ruling stands. I have no  
9 basis for going back and reopening that record. No one's  
10 asked me to do that.

11 MR. RUTER: I'm not going to ask you, because I'm  
12 not going to be here. Mr. Solomon might. And you may or may  
13 not allow him to do so.

14 THE COURT: So the point is this, right now we're  
15 dealing with a specific gun.

16 MR. RUTER: Yes.

17 THE COURT: And the government has disclaimed any  
18 intention to introduce that into evidence. The motion that's  
19 before me is to suppress the gun.

20 MR. RUTER: Yes.

21 THE COURT: Well, that's no longer ripe. There's  
22 nothing -- there's no case or controversy with respect to that  
23 issue. Why wouldn't it be an advisory opinion that I would be  
24 entering?

25 MR. RUTER: Well, I attempted to answer that when

1 you asked the question is it moot. And my response is, I  
2 don't think it's moot because of their intention of  
3 introducing the underlying conviction of the very gun that  
4 you're about to rule on.

5 THE COURT: I find --

6 MR. RUTER: But I could be wrong, Judge Bredar.

7 THE COURT: Listen, you're doing a great job and  
8 fighting for your client and illuminating relevant issues.  
9 I'm with you a hundred percent. I'm just not going to rule in  
10 your favor. I find that with respect to the gun, which is  
11 what the motion is directed at, it is appropriately now found  
12 to be moot and it is denied as moot.

13 Does that preclude other theories or litigation with  
14 respect to other aspects of the government's proof? I mean,  
15 we are passed the motions deadline, but the ruling goes as far  
16 as it goes, which is to say that there's nothing for me  
17 specifically to decide anymore in reference to that motion,  
18 because the government's not going to introduce the evidence  
19 that the motion, on its face, is directed at. So the motion  
20 is denied as moot. We'll see where we go. All right.

21 Listen to Mr. O'Toole. He's got a lot of  
22 experience, he'll give you good advice.

23 Mr. Martinez, what's next?

24 MR. MARTINEZ: Your Honor, I think in light of the  
25 fact Mr. Harvey's motions are being held in abeyance, we've

1 now completed the motions that require the taking of witness  
2 testimony. And so we can now turn to motions that require  
3 legal argument only. And I would propose that we just address  
4 these in the order they're addressed in our motions response  
5 starting with the motion to sever. And this is filed by  
6 Kenneth Faison, Kenneth Jones, Marquise McCants, and Gerald  
7 Johnson.

8 THE COURT: Let me see Mr. Ruter and government  
9 counsel at the bench on a housekeeping matter.

10 (Bench conference on the record.)

11 THE COURT: Refresh my recollection as to why you  
12 are saying what you're saying about, "I'm not going to be a  
13 part of this."

14 MR. RUTER: I'm just here, Judge, for the motions  
15 hearing.

16 THE COURT: Because of Mr. Solomon's still  
17 developing re-entry into the case, is that what you're talking  
18 about?

19 MR. RUTER: No, I was advised by, I think your  
20 chambers and by Maureen Essex, that I was to handle this  
21 motions hearing. And so I just then reviewed the documents,  
22 did my own little surveillance --

23 MS. HOFFMAN: You're a pretty good pinch hitter.

24 MR. RUTER: -- and did my argument and so I'm out.  
25 That's why I made the comment. I don't know what's going to

1 happen as far as --

2 THE COURT: What's government's counsel's  
3 understanding of the status of Mr. Solomon vis-a-vis trial?

4 MS. HOFFMAN: Our understanding is that he will be  
5 representing Mr. Bonds at trial. We certainly have no  
6 objection in light of what happened today to him filing such a  
7 motion to preclude this guilty plea. We would like a chance  
8 to respond to it, but we have no objection to the filing of  
9 such a motion.

10 THE COURT: Right. And --

11 MR. MARTINEZ: Do I understand the Court to be more  
12 concerned about Mr. Bond's Sixth Amendment rights to have  
13 continuing counsel --

14 THE COURT: That's really what I'm focused on at the  
15 moment, is the overall relationship between the client,  
16 yourself, and Mr. Solomon and where all that stands. It seems  
17 like it's an appropriate moment to sort of make a record on  
18 that, as you understand it. And let's get Mr. Bonds on an  
19 earpiece, please. The clerk will ensure that only Mr. Bonds  
20 has his earpiece in and everybody else is -- collect the  
21 earpieces from everyone else. Thank you. Help her, Mr. Jaco.

22 (Pause in the proceedings.)

23 THE COURT: Back on the record. Mr. Bonds, if you  
24 can hear me, raise your hand.

25 DEFENDANT BONDS: (Indicating).

1 THE COURT: Let the record reflect that Mr. Bonds is  
2 able to hear us, he's raised his hand. Go ahead, Mr. Ruter.

3 MR. RUTER: Your Honor, you wanted me to address the  
4 issue or --

5 THE COURT: Explain the situation.

6 MR. RUTER: Your Honor, sometime ago I received a  
7 call from the Criminal Justice Act supervising attorney,  
8 Maureen Essex, concerning whether or not I would have the  
9 ability to represent Mr. Bonds at a motions hearing scheduled  
10 for yesterday and today, because Mr. Bonds's attorney David  
11 Solomon could not make it. I don't --

12 THE COURT: How did -- I think there's an even  
13 further background to the story, which is that I believe  
14 Mr. Solomon was originally on the case?

15 MR. RUTER: He was.

16 THE COURT: Then he became ill.

17 MR. RUTER: Yes.

18 THE COURT: Then he --

19 MS. HOFFMAN: Mr. Van Hoven.

20 THE COURT: -- left the case, Mr. Van Hoven came in  
21 the case, then some difficulties arose in the relationship  
22 between Mr. Van Hoven --

23 MS. HOFFMAN: There was an unforeseen conflict.

24 THE COURT: It was a conflict that progressed. By  
25 the time that conflict arose, fortunately, Mr. Solomon's

1 health had unexpectedly taken a turn for the good, and  
2 Mr. Solomon somewhat unexpectedly found himself in a physical  
3 condition where he was able to return to practice.

4 MR. RUTER: Yes, that's true.

5 THE COURT: But he had some travel plan or some  
6 other conflict that was going to interfere with his ability to  
7 participate in this hearing. So the consequence of that was  
8 that court staff were directed to locate other counsel who  
9 would be able to assist Mr. Bonds and all of this, although  
10 the defendant doesn't have the right to choose his lawyer in  
11 an appointed counsel context. In this particular instance, my  
12 understanding is that Mr. Bonds didn't have any objections to  
13 the situation and that you came into the relationship,  
14 Mr. Ruter, and have been representing him on these motions,  
15 but with the understanding between yourself, Mr. Solomon, and  
16 Mr. Bonds, that Mr. Solomon would be coming back into the case  
17 as trial counsel.

18 MR. RUTER: Yes, and when I met Mr. Bonds, Your  
19 Honor, I thought it was appropriate that I should -- he should  
20 see me face to face before I -- he sees me in court. When I  
21 met him last week, I had reviewed briefly what you just  
22 outlined, and he seemed to have understood all of that. So  
23 I'm confident that Mr. Solomon had explained all that to him,  
24 given my discussions with him at the lock up at Chesapeake  
25 last week.

1 THE COURT: So is that all correct, Mr. Bonds?

2 DEFENDANT BONDS: (Indicating.)

3 THE COURT: Is that a positive signal you're sending  
4 me?

5 DEFENDANT BONDS: (Indicating.)

6 THE COURT: Yes, nodding his head vigorously and  
7 raised his hand to indicate that's what happened in his view.  
8 Is that all correct, Mr. Bonds?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And he said "yes, sir" here in open  
11 court.

12 MR. RUTER: And then, Your Honor, Mr. Bonds should  
13 know, unless the Court grants otherwise, that at the  
14 conclusion of this motions hearing, I most likely would not  
15 see him again or need to meet with him. But the Court has my  
16 assurance that I'll make certain Mr. Solomon is brought up to  
17 speed on exactly where we are, is my understanding.

18 THE COURT: Well, you're both appointed to represent  
19 him at this time. You're handling the motions hearing.

20 MR. RUTER: Yes, sir.

21 THE COURT: Mr. Bonds effectively has two lawyers,  
22 Mr. Ruter and Mr. Solomon, simultaneously, and this is how the  
23 responsibilities have been divided up between the two of  
24 you.

25 MR. RUTER: Yes.

1 THE COURT: Okay. I just want the record to reflect  
2 that. I want it to be crystal clear to Mr. Bonds here in open  
3 court exactly what the arrangement is and I think it is clear.

4 Is it clear to you, Mr. Bonds?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: He's responded "yes, sir." Thank you.

7 (The following proceedings were had in open court.)

8 THE COURT: Now, Mr. Martinez.

9 MR. MARTINEZ: Yes, Your Honor. I was saying that  
10 the government proposes that we take up the various pending  
11 motions for severance. These would be a motion by Kenneth  
12 Faison, that's ECF 179; a motion by Kenneth Jones is ECF 192;  
13 Marquise McCants had a severance motion pending, it's ECF 201;  
14 and finally, Gerald Johnson, ECF 217.

15 THE COURT: 179, 192, 201, 217.

16 MR. MARTINEZ: Correct, Your Honor.

17 THE COURT: Okay. And on the defense side, who  
18 wishes to argue? The party moving for the severance has to  
19 establish actual prejudice. Who's up on the defense side and  
20 wants to take the lead on this? Mr. O'Toole.

21 MR. O'TOOLE: Your Honor, I'm not sure, we haven't  
22 discussed this as any one defendant taking the lead on it.  
23 The government's response itemizes or lists each defendant  
24 separately except for Mr. Johnson, who they don't really  
25 mention except in the first sentence. So I think I prefer to



1 address this very brief motion on behalf of Mr. Johnson.

2 THE COURT: Alone.

3 MR. O'TOOLE: And not on behalf of everybody else.

4 THE COURT: That's fine. Would you like to go  
5 first?

6 MR. O'TOOLE: Sure.

7 THE COURT: You may.

8 MR. O'TOOLE: Your Honor, I have to say, this is  
9 probably not a slam dunk severance motion. It might not  
10 even --

11 THE COURT: Those are few and far between.

12 MR. O'TOOLE: It might not be an easy lay up. But I  
13 think the prejudice is real. I can't say that joinder is  
14 improper. It would be difficult to make that argument in  
15 light of the indictment, but I think the prejudice is real in  
16 this case. In this case Mr. Johnson went to trial on very  
17 similar, if not identical charges, in the state court, and was  
18 found not guilty, including charges that involved gang-related  
19 charges.

20 His defense, our defense, is going to be that the  
21 gang-related charges in the others are not guilty as to  
22 Mr. Johnson. What they've done now by joining the entire  
23 neighborhood originally, and now down to five, is that we have  
24 over 100 overt acts over a decade period of time. And they  
25 will be alleging that each member is a member of this Black

1 Guerilla Family. And I think that by bringing in the entire  
2 neighborhood over so many counts and so many years, it's going  
3 to be -- you're going to hear some of the same things over and  
4 over and over, and by the time it's done, the jury's just  
5 going to be numb.

6 And I think that while the prejudice is difficult to  
7 point to exactly, I think it's impossible to think there's not  
8 prejudice, and it's an improper prejudice. This is not just a  
9 matter, we think, of saying that we'd be better off trying  
10 this case by ourselves. I think in this case the prejudice of  
11 trying Mr. Johnson with everybody else, especially in this  
12 lead seat that we have right here, is absolutely prejudicial,  
13 and we think, improper.

14 THE COURT: You look for problems like those that  
15 arise under *Bruton*.

16 MR. O'TOOLE: I don't see that happening.

17 THE COURT: We look for grossly disparate proof.  
18 Even that in this circuit generally has not been enough to get  
19 a severance. And there's no real suggestion of that here.  
20 The difference in your -- that you're pointing out is, there's  
21 this odd circumstance of -- there's going to be evidence in  
22 this case of some people having gone to trial and been  
23 convicted of offenses, I take it.

24 MR. O'TOOLE: Right. And the jury's going to hear  
25 that and the jury's not going to hear that he went to trial

1 and was acquitted.

2 THE COURT: It's going to be at variance with the  
3 experience that your client had.

4 MR. O'TOOLE: Correct.

5 THE COURT: And were that to be the sole evidence  
6 that was going to be presented as against any particular  
7 defendant, I think that would be problematic. But the  
8 pretrial papers in this case suggest that those convictions or  
9 trials without convictions are but a bit of the story that the  
10 government intends to present during the many weeks of this  
11 trial, and that there is an additional substantial volume of  
12 evidence that is not flowing directly from what happened in  
13 these other trial proceedings. Meaning that the uniqueness  
14 issue or standing out from the pack, however you want to  
15 describe the circumstance that appellate courts have sometimes  
16 been somewhat troubled by, I mean, it's not so present here.

17 MR. O'TOOLE: Well, you know, I think that the  
18 remedy that is routinely suggested is that someone like you,  
19 who's a persuasive and authoritative figure and quite  
20 articulate, will tell the jury to consider the evidence only  
21 as to this defendant, that defendant, and that defendant. And  
22 we've all seen that happen. And we've all said that that  
23 doesn't work. And I don't think it's going to work in this  
24 case. I think it's going to be difficult with the BGF label  
25 that the government's going to try to put on this, that the

1 state court was unable to prove, the state prosecution was  
2 unable to prove that he was a member of this gang.

3 THE COURT: Well, they might not be able to prove it  
4 here too.

5 MR. O'TOOLE: Might not, I mean, in that case he was  
6 by himself.

7 THE COURT: But rolling into this, there's  
8 substantial cause to believe that the government will support  
9 their allegations with substantial proof. Will it be  
10 persuasive? I have no way of knowing. That's not my job.  
11 But I do play sort of a gatekeeper role here in terms of what  
12 kind of proceeding are we going to allow to be conducted here.  
13 The early indications are that there's very, very substantial  
14 evidence indicating that everyone who's left in this trial was  
15 a member of this organization. Lots of indicia.

16 MR. O'TOOLE: But the Court said -- just said that  
17 there's lots and lots and lots of evidence. There's only a  
18 handful, even less than handful, of overt acts that are  
19 attributed to Mr. Johnson. So out of the 100 overt acts, only  
20 a handful are his. And so the evidence is maybe huge against  
21 the whole neighborhood or the extended neighborhood, and by  
22 its force -- by its force and with the videos that the  
23 government's going to try to get in, I think that the  
24 prejudice is extreme.

25 THE COURT: That's the problem presented in

1 hub-and-spoke type conspiracies frequently.

2 MR. O'TOOLE: Right. I understand.

3 THE COURT: That's not to suggest where your client  
4 falls, whether he's a spoke or hub, but even people who are  
5 out the spokes, there's so much law that addresses this. I  
6 understand your concerns. Who else wants to argue in terms of  
7 severance? Mr. Bussard.

8 MR. BUSSARD: Good afternoon, Your Honor. I'm in a  
9 similar situation. What happened in state court, Your Honor,  
10 prosecutor in state court made a decision to actually try  
11 Mr. Johnson, Mr. Brown, and Mr. Jones separately. So they  
12 didn't have to even confront this problem to begin with. The  
13 issues that Mr. O'Toole just raised. I don't have a joinder  
14 argument. They were indicted together, they stay together. I  
15 don't have a *Bruton* issue that I'm aware of at this point.

16 So again, it comes down to this -- do we put all  
17 these persons together? And as the Court maybe heard a little  
18 bit yesterday, things like the photo books where there's going  
19 to be two witnesses, James Cornish and Christopher Meadows, go  
20 through this photo book and they say who's BGF and who's not,  
21 then they tell a little story about them.

22 But when they write down BGF on the back of those  
23 photographs, that's a -- that's a serious prejudice to  
24 every -- it's an indictment, essentially. It may not be a  
25 legal indictment, but it's an indictment that carries a lot of

1 weight against all of our clients who are going to trial at  
2 this time, that because they're BGF and they might be in a  
3 gang, does that make it a racketeering? This could be a  
4 separate issue when we go to trial.

5 THE COURT: Remind me of how this one is charged.  
6 In this one BGF or YGF or the Greenmount Regime or whatever,  
7 is charged as the enterprise, isn't it?

8 MR. BUSSARD: It is. BGF and Greenmount Regime.  
9 It's a limiting indictment as well. And then there's Count 2,  
10 which is the drug conspiracy and it goes along with this. So  
11 I just echo -- I hate to do this, but echo Mr. O'Toole.

12 THE COURT: I hear you and there's no denying that  
13 RICO is a huge club in the hand of the government, has been  
14 ever since it was enacted. But it has generally withstood  
15 exactly this kind of challenge, which comes in different  
16 clothing in different cases, but it's basically the same beef  
17 that I've heard many times. And each time you go into the  
18 case law that has evaluated RICO for the 30 some years that  
19 it's been on the book, and the appellate courts have at least  
20 held that this is exactly what Congress's intention was, is  
21 that your association, your participation, your membership in  
22 that enterprise, provided the other elements were also proven,  
23 are appropriately considered indicia of criminal culpability.  
24 It's not your membership alone, but that's clearly a material  
25 part. So prejudicial? Yes, as is lots of information and

1 evidence that's presented in a criminal case.

2 Who else wants to argue on severance? Join --

3 MR. BUSSARD: Your Honor, can I ask the Court too,  
4 I'm going to be asking the Court later on, Mr. O'Toole brought  
5 it up, about the Court's ruling on the prior convictions and  
6 what have you.

7 THE COURT: Yes.

8 MR. BUSSARD: At some point I would like  
9 clarification of who that covers and which convictions because  
10 Mr. Jones's prior conviction is not listed in the  
11 government's -- potentially convictions that they would  
12 believe were covered by the government's response and the  
13 government's ruling.

14 THE COURT: Mr. Martinez.

15 MR. MARTINEZ: Yeah, I can clarify that now quickly.  
16 We filed our response to the pending motion by Mr. Faison,  
17 which was joined by Mr. Bonds.

18 THE COURT: The pending motion?

19 MR. MARTINEZ: Sorry, the decided motion.

20 THE COURT: Right.

21 MR. MARTINEZ: We filed a response to that motion on  
22 September 1st, which was before the Second Superseding  
23 Indictment was returned. And when the Second Superseding  
24 Indictment was returned, it included the April 11th, 2011,  
25 handgun possession offense to which Mr. Jones pleaded guilty

1 in state court. And in the table that we include in our  
2 response of prior guilty pleas that we believed would come  
3 into evidence at trial, we didn't include the April 11th --

4 THE COURT: You did or did not?

5 MR. MARTINEZ: We did not because it was not yet a  
6 part of the case. There was a footnote to the effect of, we  
7 reserve the right to amend this as charges evolve, because we  
8 had a sense at that point that a Second Superseding was  
9 coming. So I can now say for the record that, A, Mr. Jones  
10 did plead guilty to possessing that gun in state court. And  
11 we believe that the reasoning in the Court's opinion on the  
12 motion by Mr. Faison and Mr. Bonds covers that guilty plea, as  
13 it does all the others in our charge. So it is our intent to  
14 prove that one in the same manner as the others.

15 THE COURT: So Mr. Bussard, technically it wasn't  
16 ripe.

17 MR. BUSSARD: Correct.

18 THE COURT: Now it is. So I will give you a week  
19 from today to file a motion seeking to preclude that with  
20 respect to your client alone for the reason that it wasn't  
21 technically addressed when the Faison motion was originally  
22 litigated. We'll -- let's see, what's a week from today?

23 MR. MARTINEZ: The 18th, Your Honor.

24 THE COURT: The 18th, right. And we'll give the  
25 government a week to respond. That's the 25th. We'll give



1 the defendant two days to reply. That's the 27th. Okay.

2 MR. BUSSARD: Thank you, Your Honor.

3 THE COURT: That will be reflected in the order  
4 that -- the omnibus order that comes out of this hearing  
5 today.

6 MR. BUSSARD: Thank you. That will suffice.

7 THE COURT: Anybody else in that situation, that  
8 wasn't -- their convictions weren't part of the package when  
9 the Faison motion was decided? I didn't think so. Okay.

10 Back to severance, Mr. Francomano.

11 MR. FRANCOMANO: Your Honor, I filed a reply on  
12 September 29th, 2017, to the severance motions. Did Your  
13 Honor receive that?

14 THE COURT: I'm sorry?

15 MR. FRANCOMANO: Did Your Honor receive --

16 THE COURT: I don't have the docket open in front of  
17 me at the moment. If you've got a docket indication, then  
18 it's in.

19 MR. FRANCOMANO: It was --

20 THE COURT: Paper number?

21 MR. FRANCOMANO: I apologize, it was the 26th of  
22 September. I do not have the docket number in front of me.  
23 Does the government have it?

24 MS. HOFFMAN: We have it, Your Honor. I believe  
25 it's Docket No. 271.

1 THE COURT: All right. So it's of record.  
2 Mr. Francomano.

3 MR. FRANCOMANO: In that severance motion, our  
4 argument is a bit different. We're asking that the count that  
5 was added, the count of felon in possession of a handgun, that  
6 that count be severed from the other counts, which were the  
7 racketeering and the drug conspiracy, is what we're asking for  
8 in that count.

9 THE COURT: Okay. Why don't you go ahead and argue  
10 that now.

11 MR. FRANCOMANO: Thank you, Your Honor.

12 THE COURT: We'll let the government respond.

13 MR. FRANCOMANO: Your Honor, in that count the  
14 government's contending that it's all part of a common scheme  
15 or plan. I know Your Honor heard from Sergeant Landsman  
16 yesterday that Mr. Dorsey, who was in the phone calls speaking  
17 with Mr. McCants, Sergeant Landsman identified Mr. Dorsey as a  
18 BGF member. He identified him -- as there were four other  
19 people that would come that would say he was BGF. He said  
20 that he lived in the area. I think all that information  
21 should be taken as information, not as evidence for showing  
22 that Mr. Dorsey is BGF, because we've never received anything  
23 in discovery showing that Mr. Dorsey is part of BGF.

24 Your Honor, as to how he was prejudiced --

25 THE COURT: Well, the government has told you that

1 they expect to prove at trial that he is.

2 MR. FRANCOMANO: Yes, Your Honor.

3 THE COURT: Do you have all the *Jencks*?

4 MR. FRANCOMANO: No, Your Honor. Right. Well, I  
5 understand that. And I just want to bring that to your  
6 attention, Your Honor. But there also is the issue of  
7 prejudice. And the issue of prejudice is, in this case when  
8 they added the felon in possession, at this point Mr. McCants  
9 either has to have them prove that he's a felon or has to  
10 admit that he's a felon in this case. Obviously there's a  
11 preference for joinder, but our position is that --

12 THE COURT: You're talking about joinder of charges  
13 just against your client, it's joinder of charges against  
14 Mr. McCants.

15 MR. FRANCOMANO: Just the felon in possession  
16 charge.

17 THE COURT: That's an old issue.

18 MR. FRANCOMANO: Yes, Your Honor.

19 THE COURT: Got a lot of law on this one too, almost  
20 as much as there is on RICO.

21 MR. FRANCOMANO: Right. And, Your Honor, the Courts  
22 are obviously split on whether or not a charge such as this  
23 should be joined or not joined. And obviously we're in the  
24 situation where it should not be joined. There are a number  
25 of cases, such as *U.S. v. Johnson*, where courts have held that

1 joinder, an ex-felon --

2 THE COURT: What have you got from this circuit that  
3 addresses that issue?

4 MR. FRANCOMANO: Your Honor, I have a U.S. Supreme  
5 Court case in which *Greer versus Miller*, and that's 483 U.S.  
6 756, and in that one it said the Court said that presumption  
7 that a jury will adhere to a limiting instruction evaporates  
8 where there is an overwhelming probability that the jury will  
9 be unable to follow the Court's instructions and the evidence  
10 is devastating to the defense.

11 THE COURT: Generalized statement, yes. But not  
12 applied specifically to the relatively common problem of a  
13 charge of felon in possession of firearm proceeding to trial,  
14 with some other substantive count, say, armed bank robbery.

15 MR. FRANCOMANO: Correct, Your Honor. But like I  
16 said, if this count were to go to -- if the felon in  
17 possession count were to go with the other two counts, what it  
18 shows is, number one, Mr. McCants is a felon; number two, just  
19 because he's a felon he must be guilty of being part of the  
20 BGF racketeering; and then he also must be guilty of  
21 conspiring to distribute narcotics. So I think that that  
22 obviously shows there is definitely some type of prejudice  
23 against Mr. McCants because that will have to be either  
24 admitted or shown that he is a felon.

25 THE COURT: Well, let me ask the government how they

1 are intending to prove up the defendant McCants's prohibited  
2 status.

3 MS. HOFFMAN: Well, Your Honor, I think there's  
4 already going to be evidence that comes in that Mr. McCants is  
5 a felon, because certain of his state guilty pleas are going  
6 to come in as evidence against him as well. I think his  
7 prohibited status is going to be such a small blip in the  
8 universe of evidence against him that it's not really going to  
9 be prejudicial. The Second Superseding Indictment that was  
10 returned on September 20th alleges that the attempted murder  
11 of Gregory Bess on February 4th of 2017, and Mr. McCants's  
12 illegal possession of a firearm in connection with that  
13 offense, were committed in furtherance of the charged  
14 racketeering conspiracy.

15 And I don't think the Court's inquiry needs to go  
16 any further than that. A crime that's committed in  
17 furtherance of a conspiracy is by its nature connected with or  
18 part of a common scheme or plan under Rule 8(a). And I'm not  
19 aware of any case where a court has held that a conspiracy and  
20 a crime committed in furtherance of that conspiracy are  
21 improperly joined under Rule 8(a).

22 THE COURT: Mr. Francomano, I'll give you the last  
23 word if you want it, or you can submit.

24 MR. FRANCOMANO: We'll submit, Your Honor.

25 THE COURT: Okay. Well, I've heard you,

1 Mr. Francomano, and you've made your record very well, as you  
2 always do. But the motion is denied. And it's not just for  
3 the reasons outlined by the government, which I think are also  
4 quite powerful, but it is the overall circumstance of a  
5 defendant facing this sort of charge in connection with other  
6 activity that's not unrelated. It's just that the other  
7 charges wouldn't bring with them the chance that the felon  
8 evidence would be introduced.

9 Well, this charge carries that with it as an  
10 essential element. What I was going to start to push the  
11 lawyers toward is the solution that we often do work out in  
12 these kinds of cases when the evidence is other than it's  
13 apparently going to be in this one, and that is, can we reach  
14 some kind of stipulation about how we are going to prove up  
15 the prohibited status such that there's no question that the  
16 government has had their opportunity to prove that element and  
17 that element is of record, but that we don't go any further  
18 than we need to in terms of extending prejudice that comes  
19 from the nature of that offense.

20 That said, Mr. Francomano, maybe we can have that  
21 discussion here, but a lot of what Ms. Hoffman said a minute  
22 ago, it just sort of undercuts all of that. I mean, the  
23 jury's going to be hearing about your client's prior  
24 convictions in another context and for -- and under other  
25 justification. Isn't that just going to kind of completely

1 overtake this issue?

2 MR. FRANCOMANO: Your Honor, his prior convictions,  
3 which are only two of them, and --

4 THE COURT: But are they both otherwise coming in,  
5 in this trial?

6 MR. FRANCOMANO: At this point, yes, Your Honor.

7 THE COURT: Yes. Feel free to talk with the  
8 government if you think there's some way that the sting can be  
9 lessened, and you can persuade them that there's something  
10 prejudicial about it in the specific context of the felon in  
11 possession charge. Sure, I'm open to a stipulation in that  
12 regard and even open to prodding the government a little bit  
13 if you can persuade me that it actually means something in  
14 this case. Right now, based on what Ms. Hoffman just reminded  
15 me of, I don't even see how it matters that much.

16 MR. FRANCOMANO: I'll speak with them, Your Honor.

17 THE COURT: Thanks.

18 MR. FRANCOMANO: Thank you.

19 THE COURT: So the motion for severance by Defendant  
20 Mr. McCants, within his own case, separate the felon in  
21 possession charge from others that he's facing, is denied for  
22 the reasons set out here.

23 Are there any other severance motions pending?

24 MS. HOFFMAN: The motion for severance by Kenneth  
25 Faison is moot now that he has pleaded guilty, I didn't catch

1 whether Your Honor said that already.

2 THE COURT: Well, it is, as are all motions by  
3 anyone who pleads guilty. That's denied as moot. But we have  
4 to be careful to make sure there isn't somebody left in the  
5 case who joined that motion. So even if you did previously  
6 join the Faison motion for a severance, I'm telling you now  
7 you have to speak up now and reassert that motion on your own  
8 or it's denied. Is anybody standing here on their joinder of  
9 the -- they're joining in the Faison motion for severance?

10 MR. BUSSARD: Well, Your Honor, since I never had  
11 the opportunity in the first place, I will be, but I can join  
12 as --

13 THE COURT: You're not going to be able to join it  
14 because it's not going to exist in about a minute.

15 MR. BUSSARD: I will join the argument.

16 THE COURT: Well, I think in your case if you -- you  
17 believe you've got a severance motion that arises by virtue of  
18 the Second Superseding Indictment, or is this a severance  
19 motion that you contend that you made previously and were  
20 entitled to make previously, you just did it by joining  
21 Mr. Faison's motion?

22 MR. BUSSARD: No, I -- never mind, Your Honor.  
23 Excuse me, I was thinking of the other Faison motion that we  
24 were talking about previously.

25 THE COURT: Oh, no, we've already addressed that.



1 MR. BUSSARD: I apologize.

2 THE COURT: All right. Anything else on severance?  
3 Is there any severance motion that the Court has not  
4 addressed, Ms. Hoffman and Mr. Martinez?

5 MS. HOFFMAN: I don't believe so.

6 THE COURT: Mr. Jaco, can you approach?

7 (Pause in the proceedings.)

8 THE COURT: Back on the record. And for the record,  
9 severance motions addressed in paper 179, 192, 201, 217, all  
10 those motions are denied. 179 is denied as moot, the others  
11 were ruled on the substance.

12 Okay. What's next?

13 MS. HOFFMAN: Your Honor, if we're going in order, I  
14 think the next motion is the motion to suppress the fruits of  
15 the search warrant executed at 2204 Guilford Avenue on May  
16 31st of 2006. This is Docket No. 190. And I believe in our  
17 response we've laid out that we think this motion is moot  
18 because we don't intend to introduce any evidence recovered  
19 during the search warrant.

20 THE COURT: 190, that's Jones, that's the search at  
21 2204 Guilford, the house search. It was an offense that was  
22 under investigation that's unrelated to this indictment. The  
23 government's position is they don't intend to introduce any  
24 evidence that was the product of that search, is that it  
25 Ms. Hoffman?

1 MS. HOFFMAN: That's correct, Your Honor.

2 THE COURT: Why shouldn't I deny this as moot in  
3 light of the government's position, Mr. Bussard?

4 MR. BUSSARD: I have no argument on it.

5 THE COURT: Denied as moot for the reason that the  
6 government has advised the Court, it has no intention of  
7 introducing any evidence that was the product of that  
8 search.

9 MR. BUSSARD: Thank you, Your Honor.

10 THE COURT: Yes, thank you. Next, ma'am?

11 MS. HOFFMAN: The next motion in line is docket  
12 No. 195, which is also a motion by Mr. Jones to suppress a  
13 series of recorded and nonrecorded calls in November and  
14 December of 2013. I have spoken to Mr. Bussard about this  
15 motion, and I believe he intends to withdraw it now that we  
16 have cleared up a factual misunderstanding.

17 THE COURT: What's the status of 195, Mr. Bussard?

18 MR. BUSSARD: Court's indulgence for a brief moment.  
19 There was a factual inaccuracy, Your Honor, and the defense  
20 will be withdrawing that motion.

21 THE COURT: 195 is withdrawn and denied as moot.

22 Mr. Martinez?

23 MR. MARTINEZ: Next is motion 187 -- or 216, rather.  
24 I'm sorry.

25 THE COURT: 216.

1 MR. MARTINEZ: And this is Mr. Johnson's motion to  
2 suppress the fruits of a 2013 state wiretap.

3 THE COURT: Did you say 216?

4 MR. MARTINEZ: Yes.

5 THE COURT: Okay. Mr. Enzinna.

6 MR. ENZINNA: Thank you, Your Honor. Your Honor,  
7 the 4th Circuit said in the *Leavis* case that electronic  
8 surveillance is an extraordinarily intrusive investigative  
9 means and should only be used when it's necessary, and that  
10 requires that the government make a full and complete showing  
11 of the necessity for electronic surveillance in their  
12 application form. The government here --

13 THE COURT: And the Maryland State statute and  
14 procedure is virtually and material -- it's identical to the  
15 federal procedure.

16 MR. ENZINNA: Correct. Everyone agrees that the  
17 government can't simply make a boilerplate statement about  
18 necessity. Obviously, wiretap would be a great way to  
19 investigate anything. The problem here is that the government  
20 did in fact lay out what it had done to date, but then in  
21 their necessity section, if you read the necessity section, it  
22 is effectively boilerplate. Rather than giving specific  
23 factual reasons to the Court as to why electronic surveillance  
24 was necessary in this particular case, they simply made  
25 statements like, "Our confidential informants can't work their

1 way all the way up to the top of the chain," which is going to  
2 be true in any one of these cases and so on.

3 It goes on like this throughout this necessity  
4 presentation. I think the only place where there's any  
5 specific information given in the necessity section of the  
6 affidavit is with regard to undercover officers. It's on page  
7 53 of the affidavit, where they say that for -- that, you  
8 know, it's -- we can't prove our case through undercover  
9 officers doing controlled buys. And they say that we've tried  
10 to do this, but it hasn't worked.

11 And they list here -- they say for example, on April  
12 3rd, 2013, an undercover officer attempted to make a buy, and  
13 though the purpose was successful, the individuals weren't  
14 members of the target organization. On April 10th, we tried  
15 again, but people said it was too hot and nobody was doing  
16 it -- was selling that day.

17 So what the government has said here is, it's  
18 necessary because undercover officers can't make these buys.  
19 But what they've shown by their factual statement is that they  
20 tried twice in the period of one week to make undercover buys.  
21 And on one occasion they made a buy but from the wrong person.  
22 On another occasion, they went and it turned out to be a day  
23 that the people selling drugs, and presumably the targets of  
24 their investigation, were simply not selling.

25 Now, that is hardly exhaustion of the effort to use

1 undercover officers to make these kind of controlled buys. So  
2 it's not simply enough for the government to say, here's what  
3 we did, Your Honor, and here's why it's necessary and it's  
4 necessary for all the reasons -- it's necessary or at least  
5 efficient for us to use wiretapping in any case. They have to  
6 make specific ties between the facts of their own  
7 investigation and the necessity. We couldn't do it here  
8 because X. And what they've said is, we can't do it here,  
9 look, we tried, we tried twice in one week to do this.

10 And if you look at what they -- what the government  
11 did in fact accomplish, like for example, they say, our  
12 confidential sources met with limited success. Let's look at  
13 what they learned through their confidential sources. Henry  
14 Walker, guy named Stimey, has a leadership role. Gerald  
15 Johnson is the commander of BGF Greenmount Avenue. He  
16 approves all the sanctions, he focuses on the north end, he  
17 gives daily instructions, he conducts meetings. Warren  
18 Comodore transcribes these meetings. He's been arrested,  
19 Warren Comodore. Is he cooperating? Has he been approached  
20 to cooperate? Michael Robinson is a high ranking leader.  
21 William McLaren supervises dealers, dealers report to him for  
22 supplies. Martin Jenkins prepares and packages drugs. Rick  
23 Savoy supplies Jenkins. Shawn Gregg is a street-level dealer.  
24 Handy is a member. He's been arrested too.

25 THE COURT: What's a court to do, Mr. Enzinna, when

1 the affidavit that's presented to the judge who's asked to  
2 sign the wiretap order clearly shows that the government has  
3 already got enough proof to charge targets with multiple  
4 serious offenses, such as drug trafficking, even murders and  
5 homicides and this sort of thing, but the government explains  
6 to the Court that while that quantity of proof has been  
7 acquired, the government has greater aspirations, and that  
8 while they concede that they have been successful with less  
9 extraordinary measures of gathering the evidence probably  
10 necessary to gain convictions on drug crimes and even maybe  
11 discrete murders, it isn't at the point where it has explored  
12 or uncovered what it believes are probably the full contours  
13 of a criminal organization.

14 MR. ENZINNA: Well, Your Honor, I am not arguing  
15 that the government has to stop because they've got enough.  
16 But if the government does have loftier ambitions here, they  
17 want to get people higher up the chain, they want to get a  
18 bigger net --

19 THE COURT: Sometimes they just want more proof on  
20 people they've already got and can convict.

21 MR. ENZINNA: Well, I think those are really two  
22 different questions because the requirement under the wiretap  
23 statute is necessity. Now, if the government has enough  
24 proof, is it necessary?

25 THE COURT: Well, that's the question.

1 MR. ENZINNA: But I don't think that's what's going  
2 on here. Because here, what the government is saying is, we  
3 want to get to the higher up people. We can't do that. Now,  
4 what I'm saying is, they have not shown the authorizing court  
5 that they made a sufficient effort to do that through these  
6 other methods. What they've done is simply said, here's what  
7 we did do, we made a couple of undercover buys and then we  
8 quit.

9 And there was one where they had confidential  
10 sources call -- one called Mr. Johnson and one calls McLaren.  
11 And with regard to Mr. Johnson, they say in the affidavit that  
12 Mr. Johnson told the confidential source that he couldn't do  
13 the deal because he didn't have the drugs. And in the McLaren  
14 case -- McLaren, they say in the affidavit, agreed to deliver  
15 drugs, but they, the government, decided not to go ahead with  
16 it.

17 Now, how can that possibly show exhaustion of those  
18 investigative means when they've got -- they say that we  
19 contacted one of the targets and said do a deal with us and he  
20 said I would, but I don't have the stuff. Then they called  
21 the next guy and he said sure, meet me on the corner. They  
22 said we're not going to go. That's not exhausting normal  
23 investigative means. You know, I could go on --

24 THE COURT: Well, I think that you could go on, but  
25 I'm not sure that that ultimately answers the question when

1 you are talking about the investigation of an operation at an  
2 organization that is as far flung as the government told --  
3 the judge was considering the application, that they believed  
4 the organization to be. I'm not sure that it's enough for you  
5 to show in one, two, three, even four instances that, well,  
6 they didn't run that lead all the way out. They didn't pursue  
7 that avenue to the full extent that they could have. One of  
8 the things that you immediately run into is that the  
9 government often will advise that, yeah, that avenue could be  
10 pursued more, we could chase that further down, but to do that  
11 actually risks our capacity to simultaneously go down another  
12 avenue, which is also important to us.

13 MR. ENZINNA: But let's be very careful about what  
14 they really do say in this affidavit. Take for example the  
15 undercover officers making controlled buys. They say that  
16 doesn't work, we've had -- let me find what they actually do  
17 say exactly about that in the necessity section.

18 "In your affiant's experience, high-ranking criminal  
19 gang members refuse to deal with potential customers." Then  
20 they go on to say, here's what we did. What they did is, they  
21 tried two buys in the course of one week. Now, I understand  
22 what you're saying, and what they're saying is that this is a  
23 far-flung enterprise and we need to be able to investigate it.  
24 But to say we know it's a far-flung enterprise out there, so  
25 we have to exhaust our ability to use other investigative



1 means, one of our investigative means is undercover buys, so  
2 we're going to exhaust that. Okay, you guys go check that  
3 box, make two attempts in a week, and then say, okay, we're  
4 done.

5 Then we go in with the boilerplate to say that --  
6 you know, Your Honor, it's hard to do that. I mean, that's  
7 not sufficient under *Leavis*. You have to show specifically.  
8 Now, if it's a far-flung enterprise, try the two buys here for  
9 this week, try some buys someplace else on a different week.  
10 I mean, you can't simply -- it's not just a question of  
11 checking the box, and that's what happened here. They checked  
12 the boxes.

13 THE COURT: What if the authorities are working in a  
14 jurisdiction where they have the experience of routinely  
15 introducing evidence of buys having been made by informants  
16 and undercover officers and so forth, who come into court and  
17 testify about what they saw and what they heard, but the  
18 experience is that convictions are not returned in those  
19 circumstances, and so there's essentially a judgment being  
20 made by the community that that evidence, evidence of the type  
21 you're describing, isn't of a sufficient quality to warrant  
22 the return of a guilty verdict? We live in modern times when  
23 for better, for worse, in some forms it seems that the  
24 standard for, you know, proof beyond a reasonable doubt is,  
25 did I hear it, did I see it on video? If I didn't --

1 MR. ENZINNA: The CSI effect.

2 THE COURT: Some might call it the CSI effect, some  
3 might call -- well, I'm not going to editorialize.

4 MR. ENZINNA: But, Your Honor, that's another  
5 problem with this.

6 THE COURT: This is the reality of -- you know, this  
7 is something, Mr. Enzinna, I'm indulging this discussion  
8 because it's a matter of great concern. When I was a young  
9 prosecutor, the frequency with which the U.S. Attorney's  
10 Office in which I worked got a wiretap order was -- well, it  
11 was not great. And you had to be a very senior prosecutor  
12 before you were entitled to request or supervise such an  
13 investigative technique. It's amazing how things have changed  
14 in 30 years and how ubiquitous this very intrusive method  
15 is.

16 MR. ENZINNA: And part --

17 THE COURT: But there seems to have been an  
18 evolution in our assessment of just exactly how problematic it  
19 is to empower the government to listen in on people like  
20 this.

21 MR. ENZINNA: I think that's exactly right. And  
22 part of the problem is necessity showings like that made here.  
23 Now, you talked about cases where a controlled buy is not  
24 sufficient evidence to get a guilty verdict. Now, you can  
25 take any one of these investigative means, especially in cases

1 such as this where you're alleging a very broad conspiracy and  
2 say, Judge, you know, undercover buys aren't going to prove  
3 our whole case, physical surveillance isn't going to prove our  
4 whole case, confidential informants aren't going to prove our  
5 whole case. Well, that's probably true. But the question is  
6 not: Is any one of those investigative methods sufficient in  
7 and of itself? The question is: Have you exhausted your  
8 ability to use these alternative, less intrusive means of  
9 investigation to get evidence? And if you haven't done that  
10 yet, you need to go back and do it.

11 THE COURT: But that's ultimately a judgment for a  
12 judge to make in reading the affidavit and considering the  
13 application. And while they of course are to focus primarily  
14 on what's within the four corners of that affidavit, they also  
15 inevitably consider just the broader context that they're  
16 aware of and exercise their good judgment in applying that and  
17 we are -- we have moved into a different era in terms of  
18 the -- I guess the crude way of wording this is to say that it  
19 seems to be that T3 orders are more necessary than they once  
20 were.

21 MR. ENZINNA: Well, let me --

22 THE COURT: If crime is to be interdicted on this  
23 scale.

24 MR. ENZINNA: Let me read what the 4th Circuit said  
25 in the *Oriakhi*. The government must base its need on real

1 facts and must specifically describe how in the case at hand  
2 it has encountered difficulties. It is not sufficient to come  
3 in and say, Judge, we got another gang case. You know what  
4 it's like, we can't do it. And it's also not sufficient to  
5 say, Judge, we get it, we got to check the undercover buy  
6 source -- undercover buy box, so we're going to send somebody  
7 out on a Tuesday and somebody else out on a Wednesday and get  
8 that done and then come in here and say you understand, it's  
9 hard in these cases.

10 I mean, that's not what the law requires. The law  
11 requires a very specific factual presentation, that you have  
12 tried other investigative means, and that you have exhausted  
13 them. And, Your Honor, I would submit that that clearly isn't  
14 shown here. I mean, you look at what they have been able to  
15 get through these other investigative means so far with  
16 relatively minimal efforts, but they talk about monitored  
17 calls where they intercepted jail calls of people talking  
18 about the Mirage nightclub shooting, and I need you out there  
19 and I need you to grab the bank.

20 Now, all those conversations occurred within the  
21 space of a week. And then they came and they said, Judge, you  
22 understand, you know these guys -- and they do cite one call  
23 where one of the people on the call says you've got to be  
24 careful talking on these phones because they're recorded.

25 THE COURT: Well, let's first be careful about what

1 we're talking about here and whether we're talking about jail  
2 calls or whether we're attacking monitored calls pursuant to  
3 T3 orders, persons who were -- or state wiretap orders of  
4 persons who were not in the custody.

5 MR. ENZINNA: I think I'm talking about jail calls  
6 here, because I believe if I read the affidavit correctly,  
7 they're talking about -- let me see if I can find it. Oh,  
8 you're correct, Your Honor. They're not jail calls, they are  
9 wiretap calls.

10 THE COURT: I wouldn't have had this whole long  
11 discussion with you if we were only on jail calls, because I  
12 think jail calls are easy.

13 MR. ENZINNA: Okay. But the point I think that's  
14 even more to my point, which is on the jail calls they said,  
15 at least they talked about how they've got to be careful  
16 because these calls are being recorded. But if these guys are  
17 being recorded on wiretaps, and if in a space of week they  
18 record these conversations with that much evidence, shouldn't  
19 we be asking that they maybe monitor those conversations a  
20 little bit longer before we say, fine, just go ahead and  
21 monitor everybody?

22 THE COURT: Let's finish up just by clarifying what  
23 your position is on jail calls. What's your client's  
24 expectation of privacy in a jail call where he's been told  
25 that his calls are subject to being recorded?

1 MR. ENZINNA: Very minimal.

2 THE COURT: Yes.

3 MR. ENZINNA: If existent at all.

4 THE COURT: Right. Okay. Mr. Martinez, who's going  
5 to argue for the government on this side?

6 MR. MARTINEZ: I will, Your Honor.

7 THE COURT: Let me first clarify that on the jail  
8 calls I don't see any issue. I don't see where -- do you want  
9 to address the jail calls before I rule?

10 MR. MARTINEZ: I think, Your Honor, as a factual  
11 matter, the jail call issue is more pertinent to Mr. Jones.  
12 Mr. Jones was only intercepted on the state wire while having  
13 conversations from the recorded jail phone.

14 THE COURT: All right. So maybe --

15 MR. MARTINEZ: I think Mr. Enzinna's addressing of  
16 jail calls was in the context of that portion of the state's  
17 wiretap affidavit that talked about exhausting that tool for  
18 gathering intelligence.

19 THE COURT: Before I turn to Mr. Martinez,  
20 Mr. Bussard, do you want to be heard on jail calls, do you  
21 want to amplify anything that Mr. Enzinna has offered?

22 MR. BUSSARD: The only thing I would add, Your  
23 Honor, just factually speaking is, it was line H, which was a  
24 line for Michael Robinson. He was having conversations with  
25 Mr. Jones. Mr. Jones was calling from a jail.

1 THE COURT: Yes.

2 MR. BUSSARD: Limited almost nonexistent expectation  
3 of privacy. He may have had standings statutorily but for the  
4 jail calls because he was picked up on the line, but the  
5 complicated factor is the jail calls there. So consequently,  
6 Your Honor, they were all jail calls, as far as I'm aware, in  
7 a rather limited time space of October, November of 2013, if  
8 I'm not mistaken.

9 THE COURT: All right. Let's just clear the air.  
10 Does anyone want to argue to me that their client had a  
11 protected constitutional expectation of privacy in their jail  
12 calls that were monitored in this case? Because I'm about to  
13 rule on jail calls, and I want to make sure everybody  
14 understands where we're headed before I enter that ruling,  
15 that that's the topic. Anybody want to be heard on jail  
16 calls?

17 MR. BUSSARD: I don't have any case law to support,  
18 Your Honor.

19 THE COURT: So without the government being asked to  
20 argue jail calls, it -- to the extent that any of these  
21 motions are attacking the monitoring of jail calls, I don't  
22 find that there were rights or expectations of privacy on  
23 those calls that the government improperly intruded upon by  
24 monitoring jail calls, given the context. So that aspect of  
25 the motions is denied.

1           Now, Mr. Martinez, I would like your reply, your  
2           response to Mr. Enzinna on T3 or state equivalent monitored  
3           calls, not jail calls.

4           MR. MARTINEZ: Sure.

5           THE COURT: And specifically failure to exhaust  
6           demonstration of necessity. Why did you need such an  
7           intrusive measure instead of search warrants, controlled buys,  
8           trash runs?

9           MR. MARTINEZ: Sure. And I want to do three things,  
10          Your Honor. I want to focus on standard here, I want to talk  
11          about some of the other information in the wiretap affidavit  
12          that Mr. Enzinna didn't mention, and I want to address the  
13          specific factor issue with respect to undercovers. So first,  
14          with respect to the standard, Mr. Enzinna is certainly correct  
15          that there is a necessity component of -- Maryland's component  
16          is identical to the federal one.

17          He declined to discuss case law which holds that a  
18          proper showing of exhaustion can be more easily made in  
19          complex cases where the investigative goal is to identify the  
20          higher ups, in particular -- in a particular organization, and  
21          that was in fact the goal here. Not long ago, I think it was  
22          2010 or 2011, in a somewhat similar RICO case in this  
23          district, Judge Quarles explained that although the government  
24          cannot show exhaustion through a mere boilerplate recitation  
25          of the difficulties of gathering useful evidence, the burden



1 on the government is not great and courts should be weary of  
2 reading the exhaustion requirement in an overly restrictive  
3 manner unless they unduly hamper the investigative law  
4 enforcement agencies.

5 So I just wanted to add that in terms of the  
6 principles the Court should be considering as we walk through  
7 the facts of the state wiretap affidavit.

8 Mr. Enzinna did something clever, which is the same  
9 thing he did in his motion to suppress the wiretap, which is  
10 that he focused the Court only on the few pages in the  
11 affidavit that appear under the heading "Necessity." I don't  
12 think there's any reason for the Court not to consider the  
13 entire rest of the affidavit in terms of evaluating what state  
14 investigators showed the authorizing judge in terms of what  
15 they had done and whether it was successful. So I'm going to  
16 walk through each of those things and I'm going to refer the  
17 Court to information that appeared throughout the initial  
18 affidavit.

19 I want to start with confidential sources. First,  
20 as Mr. Enzinna acknowledged, there was a great deal that state  
21 investigators had done with confidential sources. And they  
22 went through in the affidavit, in a section titled  
23 "Confidential Sources," the information provided with respect  
24 to the roles and responsibilities of 12 different BGF members.  
25 They went through efforts to make controlled telephone calls.

1 Mr. Enzinna mentioned those. And they explained that one of  
2 the reasons they didn't further pursue that was because they  
3 wanted to maintain the confidentiality of their source. They  
4 didn't want to out that person because they feared for his  
5 safety. Also, they wanted to maintain the integrity of their  
6 investigation.

7 Those are all legitimate reasons not to continue  
8 forward with the tactic. The broader point here, Your Honor,  
9 is that outside the four corners of the necessity section,  
10 elsewhere in the affidavit, there was a wealth of information  
11 pertaining to what state investigators had done with respect  
12 to confidential sources. So when they got to the necessity  
13 section and they said, Judge, our efforts so far with  
14 confidential sources haven't gotten us where we want to go,  
15 that was not merely boilerplate. There was a lot of fact  
16 case-specific information in there giving the judge a sense of  
17 what they had done and where they still needed to go.

18 And, in fact, Mr. Johnson says in his motion, "If  
19 investigators had showed that over a period of months they  
20 used multiple confidential informants who had failed to obtain  
21 information regarding the upper levels of the regime despite  
22 targeted efforts to do so, that might have been enough to  
23 demonstrate that tool as unlikely to succeed." We would  
24 submit that if you look at the whole affidavit, that's exactly  
25 what it shows.

1           So moving to undercovers. Mr. Enzinna mentioned  
2     that they did only two buys in a week and that they decided  
3     further additional buys wouldn't be useful. One of the  
4     reasons why, and they explained this in the affidavit in the  
5     necessity section, they said, we've looked at the criminal  
6     histories of our targets, and we think that from a safety  
7     perspective, we're a little concerned about sending additional  
8     undercovers in there. And I think if the Court looked at the  
9     criminal histories of the target subjects, and we're not just  
10    talking about the people in this case, it was a much broader  
11    investigation at that point. That's a very reasonable  
12    fact-specific determination, that's case-specific information.  
13    There's nothing boilerplate about that. So again --

14           THE COURT: And it's in the affidavit.

15           MR. MARTINEZ: Correct. Mr. Enzinna didn't mention  
16    search warrants, but in their motion they say state  
17    investigators provided the judge with no information about  
18    search warrants. There's a whole section in the affidavit  
19    titled search warrants. And they go through all of the  
20    different occasions where they executed search warrants. In  
21    fact, they go through 30 of them over approximately four  
22    months. And I'm not sure what else they could have done, and  
23    that's seven and a half search warrants a month for over four  
24    months. And they say, Judge, this is what we've gotten, this  
25    is the kind of thing we're looking for, we haven't gotten it

1 yet. I'm not sure what more they could have done to satisfy  
2 the judge that search warrants had been exhausted.

3 Then with respect to jail calls, Mr. Johnson says  
4 they didn't give the Court any information about jail calls.  
5 There are four -- five full pages in the affidavit that go  
6 through jail calls, including some by Mr. Brown to a woman  
7 named Bria Wright, and Mr. Enzinna mentioned. In one of the  
8 calls he says, "Man, don't talk about that shit on the phone,  
9 that shit's being recorded." And the point they made based on  
10 that was, look, we can listen to jail calls, but these  
11 defendants are careful about what they do and don't discuss on  
12 the phones, so it's going to be of limited utility to us.  
13 They point to a real example in which that happened in this  
14 case. That's case-specific information. There's nothing  
15 boilerplate about it.

16 Mr. Johnson also challenges the showings with  
17 respect to surveillance, CCTV cameras, witness interviews, and  
18 grand jury subpoenas. The only argument there is the  
19 difficulties the government identified. That comes up in  
20 every big gang investigation, every big narcotics conspiracy.  
21 That may be true, Your Honor, it's hard to conduct physical  
22 surveillance. Practiced criminals do counter surveillance.  
23 Our position with respect to that is, the fact that a problem  
24 is common or the investigators bump into a problem that  
25 happens frequently is hardly reason to discount the fact that

1 it crops up in a particular case.

2 And so these officers shouldn't be dinged for the  
3 fact that they went to the judge and said, hey, surveillance  
4 isn't helping us. So we think when you put the whole thing  
5 together, you read the affidavit as a whole, you don't  
6 narrowly focus on the seven necessity page, there's an  
7 abundant showing of necessity. They went far beyond the  
8 burden that Judge Quarles explained in the *Willock* case that  
9 the government has to satisfy. And when you add to the fact  
10 that the goal of this was to identify the upper levels of a  
11 complex far-flung organization, I don't think there's any  
12 problem with the exhaustion shown here, Your Honor.

13 THE COURT: Thank you, Mr. Martinez. I'm ready to  
14 rule. I already addressed the jail calls. That aspect of the  
15 motion is denied. The affidavit seeking the warrant, the  
16 order details long investigation that had yielded substantial  
17 evidence on the broader contours of the target organization.  
18 But I'm persuaded that the judge was adequately told and it  
19 was adequately explained that the investigation had stalled  
20 out regarding the higher level leaders, the highest level  
21 leaders; and that they had still not acquired key information  
22 on who top level suppliers were of narcotics, the location of  
23 stash houses, and this sort of information; and that they had  
24 employed a number of means and methods to try to acquire that,  
25 but had reasonably stopped based on what they had run into and

1 were reasonably seeking to resort to this far more intrusive  
2 investigative technique.

3 I also conclude that the affidavit did a good job of  
4 revealing the violent nature of the target organization and  
5 that based on that a more extensive efforts at undercover  
6 operations and controlled buys and that sort of thing really  
7 weren't feasible or plausible in the context of the group that  
8 they were investigating. Physical surveillance was difficult  
9 because of the urban environment. You know, that's a little  
10 bit boilerplate and I'm not sure that that is so different in  
11 this situation than from any other.

12 But making a practical, common sense evaluation of  
13 the circumstances that were truly present here, the nature and  
14 complexity of the organization that the authorities disclosed  
15 to the judge that they were asking to enter the order, and  
16 taking into account this Court's responsibility to pay  
17 deference to the issuing judge's determination on all of these  
18 complex factual questions, causes me to ultimately conclude  
19 that the affidavit was sufficient, that it did set forth  
20 case-specific challenges and difficulties that were sufficient  
21 to warrant the issuance of wiretaps, wiretap orders. In my  
22 mind, with that conclusion, I have effectively now decided the  
23 motion that is Paper No. 216. I deny it based on these  
24 conclusions.

25 Let's see, 187 was mainly directed at the jail

1 calls.

2 MR. BUSSARD: Yes, Your Honor, based on my review  
3 and the government's position taken in their response that it  
4 was limited to the jail calls between Mr. Jones and  
5 Mr. Robinson.

6 THE COURT: Yes. So that motion has been denied and  
7 I've already discussed why. Have we finished 187 and 216, as  
8 far as the government's concerned?

9 MR. MARTINEZ: Yes, Your Honor. And we're prepared  
10 to turn to 214. That's Mr. Johnson's motion to suppress the  
11 fruits of search warrants at 1520 Madison Avenue, as well as  
12 the 2010 Hyundai vehicle on November 27th of 2013.

13 THE COURT: Is this -- whose argument is this?  
14 Mr. Enzinna, is this just an attack on the affidavit? I'm  
15 trying to remember which one this is.

16 MR. ENZINNA: No, this is an attack on the  
17 affidavit's failure to draw a nexus between the alleged  
18 criminal activity and the residence searched. I will say,  
19 Your Honor, as an initial matter, one of the -- we do attack  
20 the search on the Hyundai in here as well. And the government  
21 raised the argument that we lack standing, and I'm prepared to  
22 concede that and drop that piece of the motion.

23 THE COURT: Okay. So that -- that portion of 214 is  
24 denied because the defendant lacks standing with respect to  
25 the 2010 Hyundai automobile as part of the November 27, 2013

1 search, leaving us just with the house. One question that  
2 always jumps to my mind in these kinds of cases is, in terms  
3 of suppression, why isn't the issue resolved just by applying  
4 *Sheppard* and *Leon*? And if they were applied -- if I were to  
5 somehow come to the conclusion that you were right on the  
6 substance, wouldn't *Sheppard* and *Leon* still be in play, and  
7 how would I nonetheless suppress evidence on your theory?

8 MR. ENZINNA: Well, *Leon* does not apply where the  
9 affidavit is insufficient to allow a reasonable person to  
10 rely --

11 THE COURT: Yes, the officer himself has to  
12 understand that even though he persuaded a judge to sign it,  
13 he in his own mind reasonably should have known this is  
14 inadequate.

15 MR. ENZINNA: Right.

16 THE COURT: That's a pretty high test.

17 MR. ENZINNA: It is a high test.

18 THE COURT: An officer who's not required to have a  
19 law degree or similar training and expertise knows that it's  
20 inadequate, but a properly trained, licensed, and appointed  
21 judge didn't get it.

22 MR. ENZINNA: Well, Your Honor, let me address first  
23 of all exactly what it is that the government is arguing.  
24 What the government is arguing here is really pretty  
25 astonishing, to my mind. The government argues that under 4th



1 Circuit law, I want to quote their motion: "Warrants to  
2 search suspect's residences and even temporary abodes, 4th  
3 Circuit has consistently upheld warrants to search suspect's  
4 residences on the basis of evidence of the suspect's  
5 involvement in drug trafficking combined with the reasonable  
6 suspicion that drug traffickers store drug-related evidence in  
7 their homes."

8 THE COURT: Yes, the way I've characterized it in  
9 the past in opinions I've issued is I said that if the proof  
10 in an affidavit rises to the level where a reasonable judge  
11 could conclude this is a livelihood, this is what they're  
12 doing, this is how they spend their time, maybe even support  
13 themselves through this method and so forth, then there is  
14 probable cause to believe that there's going to be evidence of  
15 that activity found where they reside. I mean, you know, I'm  
16 a lawyer and a judge. I mostly work at the courthouse. But  
17 it's such a large aspect of my life that there's every reason  
18 to believe that if you went into my home, where I reside, that  
19 you'd find evidence that I'm a lawyer.

20 MR. ENZINNA: So where that proposition takes us is,  
21 for example, say you're a lawyer, suppose you are under  
22 investigation for fraud, and the government had evidence that  
23 you were involved in a fraud. Can they search your law office  
24 simply based on that evidence?

25 THE COURT: Well, apart from special issues

1 associated with searching a law office and attorney-client  
2 privilege and so forth, it would be a function of how  
3 extensive was the person's involvement in the activity. Is  
4 there proof to the judge that, hey, there's a one-off drug  
5 deal involving this guy, or is it more extensive than that?

6 MR. ENZINNA: Well, let's look at the evidence that  
7 the affidavit gave the judge about the alleged criminal  
8 activity. And what that evidence consists of is, one, an  
9 intercepted phone call in which Mr. Johnson was alleged to  
10 have said something about nickels, which is a drug term. Two,  
11 there was a conversation intercepted by Ms. Massey where she  
12 said to someone that "you almost got shot last night for  
13 following us home." That's it. That's the evidence they're  
14 putting in of criminal activity. That certainly does not rise  
15 to the level of so extensive an activity that it's a  
16 livelihood and it's, therefore, likely to be in their home as  
17 well.

18 First of all, the evidence of -- the conversation in  
19 which Ms. Massey said something about "you almost got shot  
20 last night," the government said, well, this is evidence that  
21 Mr. Johnson, who's a felon, wrongly possessed a firearm. What  
22 you have is a statement by his girlfriend the next day, after  
23 something supposedly happened, that "you almost got shot."  
24 No -- not even any statement that "we had a gun." Moreover,  
25 that conversation took place a month before the search. But

1 putting that aside, the evidence of drug activity, you said a  
2 one-off drug dealer. As far as I can tell, that's the  
3 evidence here.

4 THE COURT: Well, what about, wasn't there a  
5 reference in that affidavit to recordings of calls related to  
6 other drug trafficking activity?

7 MR. ENZINNA: I don't know that there was. And  
8 I'm -- I think that what the affidavit said was that there  
9 is -- that drug traffickers, it's my -- in my training and  
10 experience, I know that drug traffickers generally keep  
11 evidence of drug trafficking in their residences. There are a  
12 number of problems with that. First of all, Officer Hayden  
13 did not explain to the judge what exactly his training and  
14 experience was. Now if he just started the day before,  
15 obviously, that's different from having him start ten years  
16 ago investigating drug cases.

17 But putting that aside, the evidence that  
18 Mr. Johnson or Ms. Massey was an individual involved in drug  
19 trafficking, they cite the call, the nickels call, but beyond  
20 that, I'm not sure there is anything. They do say -- they do  
21 allege them to be members of the BGF Greenmount Regime, but  
22 that again is an assertion. It's not facts from which the  
23 magistrate can draw.

24 THE COURT: Well, he's swearing that he knows that  
25 to be true, based on the investigation that he's conducting.

1 MR. ENZINNA: Well, Your Honor, the probable cause  
2 determination has to be based on facts provided by the officer  
3 involved in the competitive enterprise of investigative crime,  
4 given the neutral unattached magistrate who can then evaluate  
5 those facts. It's not up to the officer to evaluate those  
6 facts. For example, if that were the standard, an officer  
7 could come in and say, Your Honor, I've investigated it and  
8 John Smith is a drug trafficker.

9 THE COURT: Of course. And what you're basically  
10 saying is that affidavits can't be so conclusory that they  
11 really deprive the ultimate decision maker of the opportunity  
12 to evaluate the relevant data and decide for himself or  
13 herself what's really going on here. My point, though, is  
14 that in other aspects of this affidavit they were very  
15 detailed. They talked about particular telephone calls. I  
16 think it was calls, maybe call. They talk about a particular  
17 transaction. And then in general, on top of that, provide  
18 this contextual information. They're certainly not seeking a  
19 warrant solely based on an assertion of BGF membership.

20 MR. ENZINNA: Well, but what they are seeking here,  
21 and this is important, in the *Lalor* case, which we cited in  
22 our brief, I think it was Judge Motz who wrote, "In  
23 determining whether a search warrant is supported by probable  
24 cause, the crucial element is not whether the target of the  
25 search is suspected of a crime, but whether it is reasonable

1 to believe that the items to be seized would be found in the  
2 place to be searched." The nexus requirement.

3 THE COURT: Right.

4 MR. ENZINNA: And the government is arguing there is  
5 no nexus requirement. If there is a nexus automatically where  
6 it's reasonable to suspect that this person who's involved in  
7 criminal activity --

8 THE COURT: It's not automatic, it's --

9 MR. ENZINNA: That's the government's argument.

10 THE COURT: It's inferred from certain facts: A,  
11 it's where the person resides; and B, they're involved in this  
12 activity to this extent.

13 MR. ENZINNA: Well, that's not what the government  
14 says. The government says that if we have a person who's  
15 involved in criminal activity, a drug trafficker specifically,  
16 we can reasonably assume or believe that they have evidence of  
17 it in their house and we can search their house.

18 THE COURT: All right. Let me hear from the  
19 government. And Ms. Hoffman.

20 MS. HOFFMAN: Thank you. I think Mr. Enzinna does a  
21 good job of trying to distinguish *Williams*, *Grossman*, and  
22 *Servance* on their facts, but in reality they do stand for a  
23 broader proposition of law, and that is, I quote, "The nexus  
24 between the place to be searched and the items to be seized  
25 may be established by the nature of the item and the normal

1 inferences of where one would likely keep such evidence."

2           So as Your Honor pointed out, it's not automatic.  
3 There need to be facts from which the judge can infer that it  
4 is reasonable for the person -- the subject of the warrant to  
5 store evidence of criminal activity in their residence. The  
6 case law is very clear that you don't need evidence directly  
7 tying a subject's drug trafficking activity to his residence  
8 if the affiant explains or the judge implicitly finds that  
9 drug traffickers normally keep drugs in their residences.  
10 That's a rule of decision that is binding in this circuit.

11           And here the affidavit describes two different  
12 wiretap calls in which Mr. Johnson discussed illegal drug  
13 trafficking. I think Mr. Enzinna makes a similar mistake here  
14 as he did with the motion to suppress the state wiretap. He  
15 focuses exclusively on one section of the affidavit but misses  
16 some of the information supporting probable cause in later  
17 sections of the affidavit.

18           So for example, later on in the affidavit, in  
19 paragraphs 46 and 47 of the affidavit, the affiants explain  
20 that on that date Mr. Johnson was intercepted in a wiretap  
21 call with a known BGF leader, Henry Walker, a/k/a Stimey,  
22 during which the two agreed to meet so Walker could give  
23 Mr. Johnson an unknown object. Shortly thereafter, Detectives  
24 Hood and Smith observed Kelly Massey, the co-resident of the  
25 residence, and Johnson in the vehicle, the Hyundai Sonata,

1 traveling southbound in the 1700 block of Latrobe Street  
2 directly behind another vehicle driven by Walker. They were  
3 able to follow the vehicles to the Madison Avenue premises,  
4 the subject residence, where they observed Johnson exit the  
5 passenger seat of that vehicle and enter the rear door of the  
6 residence.

7 So again, we have a surveillance of a suspected drug  
8 transaction, following which Mr. Johnson goes directly to that  
9 residence. So even if it's true that you need evidence  
10 directly tying the drug trafficking activity to the residence,  
11 we do have that here.

12 I did also want to correct one factual statement by  
13 Mr. Enzinna. Detective Hayden, who was one of the affiants,  
14 did describe at length his training and experience in this  
15 affidavit. It's a different affidavit. It's the affidavit  
16 supporting the social media warrants in which there was not  
17 information supplied about his training and experience. But  
18 in this one, both Jonathan Hayden and two other detectives who  
19 were co-affiants, did describe their training and experience  
20 at length and explained that based on their extensive  
21 experience it is very common for drug traffickers to keep  
22 drugs and drug paraphernalia in their residences.

23 THE COURT: Tell me again about the tie to the  
24 particular house. What's the government's theory on the fact  
25 that it's not just that he's a drug dealer and this is where

1 he lives, but an actual action or act in relation to that  
2 house?

3 MS. HOFFMAN: So they intercepted on October 9th of  
4 2013 a wiretap call between Mr. Johnson and a known BGF  
5 leader, Henry Walker, in which they discussed exchanging an  
6 unknown object, which the detectives believed to be illegal  
7 contraband, and they do spell that out in the affidavit. They  
8 explain that they conducted surveillance and saw Mr. Johnson,  
9 immediately after the suspected transaction, enter the subject  
10 premises.

11 THE COURT: Okay. Thank you. I'll give you the  
12 last word, Mr. Enzinna, or you can submit.

13 MR. ENZINNA: Thank you, Your Honor. I just want to  
14 address case law, briefly. The government -- I'm sorry,  
15 Ms. Hoffman talked about case law, and it's good law in this  
16 circuit, but let's be careful exactly what that case law says.  
17 First of all, the *Williams* case, the Court did not find there  
18 was probable cause. The Court said we don't have to resolve  
19 that under *Leon*, so they never address the issue of probable  
20 cause.

21 Second, in *Grossman* and in *Servance*, both of those  
22 cases, and I think we detailed this in our reply brief, there  
23 is direct evidence tying the drug activity to the houses. For  
24 example, in one case the defendant is in the house for three  
25 and a half hours, leaves the house, goes immediately to meet



1 someone and conduct what appears to be a drug transaction.  
2 And the other one, the suspect is driving to the house, takes  
3 evasive action to try and lose this surveillance, the tail  
4 that's coming behind him, and gets to the house, looks around,  
5 goes in the house, takes a key, opens the door, goes in, stays  
6 in there for a little while, then comes out, goes to get in a  
7 different car. When the police officer approached him, he  
8 said, I was never in that house, said that's not my car, said,  
9 I didn't have a key, and lied about what was in the house.

10 So by taking that evasive action and then disavowing  
11 any connection to the house, he provided some suggestion that  
12 there was evidence of his illegal activity in the house. Now,  
13 I'm -- I apologize, I'm trying to find in the affidavit  
14 exactly where this -- the surveillance that Ms. Hoffman talked  
15 about. Can you tell me the paragraph?

16 MS. HOFFMAN: It's paragraphs 46 and 47.

17 MR. ENZINNA: Is that your Exhibit 18?

18 MS. HOFFMAN: It is in Exhibit 18.

19 MR. ENZINNA: 46, you said? I'm sorry.

20 MS. HOFFMAN: Paragraphs 46 and 47, might start with  
21 paragraph 45.

22 MR. ENZINNA: Okay. Thank you. Yeah, here's what  
23 happens: Johnson and Walker arranged meet so that Walker can  
24 give something to Johnson. They arranged to meet at a house,  
25 then they saw a Chevy Impala in the neighborhood where the

1 house was. And they saw Walker get out of the car, go to a  
2 house, and take an unknown object from somebody, get back in  
3 the Impala, and drive away. Then he advised Johnson he was on  
4 Latrobe Street, and they saw the red Impala being followed by  
5 the gray Hyundai, and then Johnson got out of the vehicle and  
6 entered through the rear door.

7 I've -- let's assume for argument's sake that  
8 whatever Mr. Walker was going to get was evidence of drug  
9 activity or was involved in drug trafficking. Where is the  
10 connection to that evidence in the house, Mr. Johnson's house?  
11 What the detectives say is, we saw Mr. Walker do this thing  
12 with this thing, we didn't know what it is, and get in his  
13 car, then we saw Mr. Johnson driving behind him. Where's the  
14 connection? There's no argument that we saw Mr. Johnson give  
15 something to -- Mr. Walker give something to Mr. Johnson.  
16 There's no argument that we saw Mr. Johnson get in  
17 Mr. Walker's car or vice versa. I mean --

18 THE COURT: Thank you, Mr. Enzinna. I understand  
19 the argument. The simplest way to resolve this problem is to  
20 simply look at what *Sheppard* and *Leon* tell us in such  
21 circumstances. The picture, if it is muddled on the question  
22 of whether there really was probable cause or not, it was not  
23 so muddled that an officer submitting an affidavit containing  
24 this information to a judge would understand for certain,  
25 would understand by whatever standard is applicable or

1 appropriate in the circumstance that this is not probable  
2 cause, see if this judge will sign it, but I know it's not.

3 No, this is not close to that at all. A reasonable  
4 officer would reasonably submit this affidavit and hope and  
5 expect to receive a warrant and not be engaged in anything in  
6 conflict with his or her training, anything that was dishonest  
7 or deceptive. The standard -- so in light of that, the motion  
8 is denied just by application of *Sheppard* and *Leon*, and I so  
9 hold.

10 But beyond that, you know, there's another principle  
11 that comes into play, and that is, the standard isn't really  
12 whether I, sitting here on this bench, with everything that's  
13 been presented to me, would conclude that I would issue that  
14 warrant. Some deference is owed to the issuing judge's  
15 determination and their weighing of the information that's  
16 been presented to them, and they have the discretion to make  
17 their judgment about that. And it's only when that judgment  
18 starts to really become questionable in the application of  
19 basic probable cause principles that a judge sitting where I  
20 am now should say, no, I don't think there was probable cause  
21 and that judge shouldn't have issued that warrant and as a  
22 consequence there really wasn't probable cause for it.

23 That still doesn't get us by the *Sheppard* and *Leon*  
24 problem. But I judge this situation to be one that is  
25 certainly within the range where a judge could reasonably come

1 to the conclusion that there was probable cause to issue an  
2 order to search that house, based on the totality of the  
3 information that was presented in that affidavit.  
4 Accordingly, the motion's denied, on the separate ground that  
5 there was probable cause -- or the judge's assessment that  
6 there was probable cause, so it was reasonable and  
7 appropriate.

8 All right. Now where are we?

9 MS. HOFFMAN: Your Honor, the next motion is Docket  
10 No. 215, which is also a motion by Mr. Gerald Johnson.

11 THE COURT: Right.

12 MS. HOFFMAN: To suppress the fruits of a  
13 warrantless search of his person on June 30th of 2016. The  
14 government last week filed a motion to dismiss Count 7 of the  
15 Second Superseding -- I'm sorry, Count 6 of the Second  
16 Superseding Indictment charging Mr. Johnson with possession  
17 with intent to distribute crack cocaine related to that  
18 search. And we are prepared to stipulate that we will not  
19 present any evidence of the recovery of that crack cocaine at  
20 trial. So we believe that that moots this motion.

21 THE COURT: Agreed, Mr. Enzinna?

22 MR. ENZINNA: Yes, Your Honor.

23 THE COURT: Okay. Denied as moot. Government's not  
24 going to offer the evidence.

25 MS. HOFFMAN: The next motion, Your Honor, is Docket

1 No. 180, I believe, which is Kenneth Faison's motion to  
2 suppress the fruits of a search warrant executed on a cell  
3 phone seized from him on November 15th of 2016, and I think we  
4 can also deny that motion as moot now that Mr. Faison has pled  
5 guilty.

6 THE COURT: Anyone object to my denying that as  
7 moot? 180 is denied as moot.

8 MS. HOFFMAN: The next motion, Your Honor, is Docket  
9 Nos. 213, 191, and 211. This is the motion to suppress social  
10 media evidence pursuant to search warrants by Gerald Johnson,  
11 that's Docket 213; Kenneth Jones, that's Docket 191; and  
12 Marquise McCants and that's Docket 211.

13 THE COURT: So I've got 191, 211, 236, and 213 in  
14 that group. Do I have that right?

15 MR. DAVIS: 236 would be my motion to adopt, Your  
16 Honor.

17 MS. HOFFMAN: I'm sorry, Your Honor, then yes, 236  
18 as well.

19 THE COURT: 236 would be your motion to adopt?

20 MR. DAVIS: Adopt and conform.

21 THE COURT: So 191, 211, 236, which is adopting 211  
22 and 213. That's what I've got in that group. Have I got them  
23 all?

24 MS. HOFFMAN: I believe that's correct, Your  
25 Honor.

1 THE COURT: Okay. That's Mr. Enzinna and  
2 Mr. O'Toole, that's Mr. Bussard, that's Mr. Francomano, and  
3 Mr. Davis. Is there a consolidated position on behalf of the  
4 defendants that one lawyer is prepared to argue on behalf of  
5 most if not all of you?

6 MR. BUSSARD: Your Honor, Mr. Jones's motion, ECF  
7 Paper No. 191 is different, and if I may be heard, I think we  
8 can resolve that --

9 THE COURT: Okay. Where are you on 191?

10 MR. BUSSARD: Your Honor, the facts on 191 are  
11 simply, while Mr. Jones is incarcerated there are other  
12 persons with social media accounts, Instagram, what have you,  
13 and they -- our motion is simply that there are posts on those  
14 social media accounts talking -- maybe talking about  
15 Mr. Jones. They're not -- there's no communication with  
16 Mr. Jones because he's incarcerated and doesn't have access to  
17 the internet. However -- so he may not have standing that's  
18 one problem. Two, it's more in the form of a motion in limine  
19 and I think I could --

20 THE COURT: Yes, that's how I'm hearing it,  
21 Mr. Bussard. This sounds like a trial issue, and you know,  
22 relevance. How are you going to connect these communications  
23 to him and demonstrate that they're his communications, et  
24 cetera? Those are trial problems.

25 MR. BUSSARD: Correct. I missed that, Your Honor,

1 but I think it is going to be a motion in limine at some point  
2 either orally or on a renewed --

3 THE COURT: Or it's just a trial objection when they  
4 start to introduce the evidence. I mean, I don't want to put  
5 the government to their proof at this particular moment, but  
6 is your theory on this with respect to Mr. Jones that these  
7 are just admissions of his or co-conspirator statements or  
8 what is it?

9 MS. HOFFMAN: Your Honor, I believe they're -- there  
10 will be co-conspirator statements that we seek to admit that  
11 were made in furtherance of the conspiracy. I'm not aware of  
12 any actual communications in which Mr. Jones was directly  
13 involved, although our position is that he was a member of the  
14 conspiracy throughout that period of time, and so statements  
15 made by his co-conspirators in furtherance of the  
16 conspiracy --

17 THE COURT: So might well be a statement on an  
18 account ostensibly owned by him that you can't prove that he  
19 made, in fact he was in jail, but you contend that you can  
20 prove that a co-conspirator made it, so it's coming in as his  
21 statement anyway.

22 MS. HOFFMAN: Exactly.

23 THE COURT: Well, that's just standard stuff for  
24 trial. We'll see if they can actually pull that off or not.

25 MR. BUSSARD: Very well.

1 THE COURT: But I'm not going to decide that weeks  
2 before trial. Okay. So 191 is denied without prejudice,  
3 denied without prejudice as premature.

4 MR. BUSSARD: Thank you, Your Honor.

5 THE COURT: Mr. Jaco, with me?

6 THE CLERK: Yes.

7 THE COURT: Okay. So who's left, Mr. Enzinna?

8 MR. ENZINNA: Thank you, Your Honor. Our motion to  
9 suppress the social media evidence is based on two pieces to  
10 it. One is the magistrate judge's authority issue to a  
11 warrant.

12 THE COURT: Right.

13 MR. ENZINNA: The other is the probable cause piece  
14 of it.

15 THE COURT: What about this whole notion that it's  
16 actually Stored Communications Act?

17 MR. ENZINNA: Well, it is. But the Stored  
18 Communications Act says that the warrant should be issued  
19 under the procedures of Rule 41. And the government reads  
20 that as --

21 THE COURT: Whoa, whoa. What, including the fact  
22 that magistrate judges don't have nationwide authority on SCA  
23 papers?

24 MR. ENZINNA: Well, that's what Rule 41 says.

25 THE COURT: What's the case law say on that?



1 MR. ENZINNA: Well, I have to admit, the case law on  
2 this is not very favorable to me.

3 THE COURT: I think that's a settled question.

4 MR. ENZINNA: It's not in the 4th Circuit a settled  
5 question. So I'm prepared to submit.

6 THE COURT: Okay. You've got your issue on that,  
7 but --

8 MR. ENZINNA: Understood.

9 THE COURT: -- the Court is going to rule against  
10 you, unless you have some other argument you want to make in  
11 that regard.

12 MR. ENZINNA: No. I'd like to address the probable  
13 cause piece.

14 THE COURT: So I am ruling at this point that the  
15 judge's authority on the Stored Communications Act is  
16 national. Despite that reference to Rule 41, I find that's  
17 not what it means and that Congress's intent is more  
18 specifically expressed in the actual language of the statute  
19 and that -- who was it, Judge Copperthite?

20 MS. HOFFMAN: It was Judge Copperthite.

21 THE COURT: Judge Copperthite acted within his  
22 authority.

23 MR. ENZINNA: Thank you, Your Honor.

24 THE COURT: So now, did he have probable cause, was  
25 probable cause presented to him?

1 MR. ENZINNA: I'm sorry?

2 THE COURT: Was there probable cause?

3 MR. ENZINNA: Yes. The probable cause showing here  
4 was based on a couple things. One was Officer Hayden saying  
5 that based on my training and expertise I know that people  
6 involved in drug trafficking often use their social media  
7 accounts to further that activity. Problems we talked about  
8 earlier is that Officer Hayden did not explain what his  
9 training and experience is.

10 Second, he said people who are involved with drug  
11 trafficking. He did not provide the magistrate with the  
12 facts --

13 THE COURT: Magistrate judge.

14 MR. ENZINNA: Magistrate judge, I apologize.

15 THE COURT: In this courtroom, the word "magistrate"  
16 is an adjective, not a noun.

17 MR. ENZINNA: Yes, sir. Officer Hayden did not  
18 provide the magistrate judge with facts from which he could  
19 determine that Gerald Johnson, whose social media account it  
20 is, was in fact the individual involved in drug trafficking  
21 activity in his affidavit.

22 Third, he argues -- Officer Hayden sends the  
23 magistrate judge -- look at his social media, there's all this  
24 evidence of criminal activity. They're -- he's wearing  
25 jewelry and holding money and talking about drugs and talking

1 about shooting people and stuff, as though these are  
2 documentaries that Mr. Johnson has created as a narrative of  
3 his life, as opposed to what they are, which is -- now  
4 Mr. Johnson is --

5 THE COURT: An entertainer.

6 MR. ENZINNA: He is involved in that activity.  
7 Rapping is a legitimate form of art and people do it. And  
8 part of the conventions and the tropes of that involve this  
9 type of activity because that's where the -- this form has  
10 evolved. And you know, it's like we said in the motion, it's  
11 almost like arguing that we have probable cause to believe  
12 that Johnny Cash killed a man in Reno. You know, at some  
13 point art is art and life is life.

14 THE COURT: Yes, I agree.

15 MR. ENZINNA: I'll rest on that.

16 THE COURT: Okay. I'll hear from the government.

17 MS. HOFFMAN: Thank you, Your Honor.

18 THE COURT: He didn't tell what his qualifications  
19 were.

20 MS. HOFFMAN: That's true, he didn't.

21 THE COURT: Yes, well, that's a little bit  
22 problematic; isn't it?

23 MS. HOFFMAN: I think you can excise his statement  
24 that drug traffickers and gang members commonly use social  
25 media to intimidate witnesses and communicate with drug

1 customers. You can excise that completely from the affidavit  
2 and there would still be more than ample showing of nexus  
3 here.

4 THE COURT: It may also not require much expertise  
5 to reach that conclusion.

6 MS. HOFFMAN: That's correct, Your Honor.

7 THE COURT: Someone who is a police officer on his  
8 first day as a sworn officer's probably been to the police  
9 academy and received some basic training in how criminal  
10 activity is --

11 MS. HOFFMAN: I think that's right. This affidavit  
12 in particular contains pages and pages of very concrete  
13 examples of Mr. Johnson's use of his social media accounts,  
14 his Facebook and Instagram accounts, to demonstrate his  
15 involvement in drug trafficking and violent crimes, his  
16 membership in BGF, his attempts to tamper with witnesses  
17 against him and in the state trial, among other racketeering  
18 activities. And there's actually a video in which he  
19 advertises drugs for sale. He says, "Big dimes of that shit  
20 right here, big loud packs" and holds it up.

21 There's a direct message from his -- one of his  
22 Instagram accounts that was recovered from a cell phone that  
23 was recovered from Mr. Johnson on June 30th of 2016 in which  
24 he asks an associate if he has any 45 shells, which we believe  
25 is a reference to .45 caliber ammunition. I could go on and

1 on. I think there's, like I said, more than ample probable  
2 cause evidence, nexus evidence --

3 THE COURT: I'm ready to rule. Mr. Enzinna, I  
4 always had one question about this Johnny Cash song: How do  
5 you end up in Folsom Prison if he shot a man in Reno?

6 MR. ENZINNA: That's an excellent question.

7 THE COURT: I'm sure there's something on the  
8 internet about that.

9 MR. ENZINNA: I'm sure there's a scholarly article  
10 on that somewhere.

11 THE COURT: That always bothered me from a  
12 jurisdictional standpoint. The -- the circumstances in this  
13 affidavit, I find, the evidence in the information that's  
14 supplied is more than sufficient to demonstrate probable  
15 cause. The -- we have made humorous reference to the Johnny  
16 Reno -- the Johnny Cash song and "I shot a man in Reno,"  
17 that's made by someone who is, based on ample other outside  
18 evidence available to everyone, who is clearly an entertainer.  
19 And yes, we use contextual clues all the time to sort out  
20 whether or not somebody is saying something for real or for  
21 pretend.

22 And that sort of assessment has to occur all the  
23 time with respect to information. And when we're listening to  
24 Johnny Cash sing that song, we have all the contextual clues  
25 in the world to indicate this is entertainment. And at least

1 to my knowledge, Johnny Cash never shot a man in Reno. The  
2 contextual clues that are otherwise provided in this social  
3 media account and the information that is supplied on it, plus  
4 the other information that appears in the affidavit, suggests  
5 just the opposite with respect to this defendant. And Judge  
6 Copperthite was entitled, based on the information submitted  
7 to him, to conclude that there's probable cause. So that  
8 motion's denied.

9 All right. What else have we got?

10 MR. MARTINEZ: Next up, Your Honor, is ECF 205.  
11 This is Mr. McCants's motion to suppress the federal wiretap  
12 through which the calls Your Honor listened to yesterday were  
13 intercepted.

14 THE COURT: Mr. Francomano.

15 MR. FRANCOMANO: Your Honor, basically our argument  
16 would be almost the same as Mr. Enzinna's. The only thing I  
17 did want to add is just in this case it's the issue with the  
18 search warrant. The government said they executed one search  
19 warrant. It's our position that that's not enough, that they  
20 could have tracked Mr. Dorsey, they could have found out where  
21 he lived, they could have done a number of other investigative  
22 techniques to find him. Thank you, Your Honor.

23 THE COURT: Thank you, Mr. Francomano. And I adopt  
24 the explanation for my ruling on the earlier motion, the  
25 number of which I forget at the moment, but the one directed

1 at the state wiretap, and the same explanation for why this  
2 affidavit on the federal wiretap was sufficient. I  
3 incorporate that earlier ruling because the analysis is  
4 exactly the same. Motion denied.

5 MR. MARTINEZ: Next, Your Honor, is ECF 203, that's  
6 another motion by Mr. McCants. That's a motion to suppress  
7 statements. The motion doesn't identify any statements in  
8 particular. I understand it was filed by Mr. Francomano in an  
9 abundance of caution, although --

10 MR. FRANCOMANO: I spoke with Mr. Martinez and I  
11 spoke with my client, we're going to withdraw that motion,  
12 Your Honor.

13 THE COURT: 203 is withdrawn and denied as moot.

14 MS. HOFFMAN: I believe the next motion is Docket  
15 No. 199, which is Mr. McCants's motion to dismiss Count 1.  
16 It's two different grounds. One ground is that the indictment  
17 fails to allege the elements of the offense, and the other is  
18 that it charges multiple conspiracies.

19 THE COURT: Mr. Francomano.

20 MR. FRANCOMANO: Your Honor, we would submit on two,  
21 the second one.

22 THE COURT: Yes.

23 MR. FRANCOMANO: The first one we'd just like to  
24 argue that the indictment here under *U.S. v. Morrow*, 39 F.3d  
25 1228, the 1st Circuit: "An indictment may charge that a

1 single conspiracy had multiple criminal objectives, but to  
2 support the charge of multiple criminal conspiracy, at a  
3 minimum, a conspirator must have knowledge of foregoing the  
4 conspiracy's multiplicity of objectives."

5 We're saying here, in a 120-count -- or 120 overt  
6 acts, where Mr. McCants has five, I don't believe that in this  
7 situation that that single count is -- they've gone through  
8 the entire counts, is what we're trying to say, Your Honor,  
9 and submit.

10 THE COURT: I understand. Government want to make a  
11 record?

12 MS. HOFFMAN: Well, it sounds to me like more of a  
13 motion to sever than a motion to dismiss, based on multiple  
14 conspiracies. I think it's clear that the indictment alleges  
15 that Mr. McCants joined a single overall agreement involving  
16 the same actors, the same goals, and methods. And the case  
17 law makes clear that members of the conspiracy may have  
18 different roles, there may be different evidence against each  
19 of them. Each member may not need to know the full scope of  
20 the conspiracy or all its members. That does not mean that  
21 there are multiple conspiracies so long as there's one overall  
22 agreement.

23 THE COURT: And I am prepared to rule that based on  
24 how it is framed in the indictment, it does allege one  
25 conspiracy; many, many elements and many, many overt acts to



1 it. But there are agreements that are themselves complex,  
2 broad, far flung, but nonetheless, conceptually are best  
3 understood to be all part of the same overall global agreement  
4 and this is in that category, at least as charged. We'll see  
5 what the proof is at trial. The motion's denied. And there  
6 were -- the -- both motions are denied. What were those  
7 numbers again?

8 MS. HOFFMAN: It's Docket No. 199.

9 THE COURT: Both elements of it within 199?

10 MR. FRANCOMANO: Yes, Your Honor, just 199.

11 THE COURT: Two theories, one motion.

12 MR. FRANCOMANO: Correct, Your Honor.

13 THE COURT: Okay. Denied on all theories.

14 MS. HOFFMAN: I believe the next motion is Docket  
15 Nos. 188 and 206. These are the motions by Kenneth Jones and  
16 Marquise McCants for the disclosure of evidence pursuant to  
17 Federal Rule of Evidence --

18 THE COURT: Did you say 188 and 206?

19 MS. HOFFMAN: 206, that's correct.

20 THE COURT: Oh, yes.

21 MS. HOFFMAN: And this is a motion for disclosure of  
22 evidence pursuant to Rule 404(b). I think the government  
23 addressed this motion in our response. We don't intend to  
24 present any Rule 404(b) evidence in our case in chief. All  
25 the evidence we plan to present is intrinsic to the charged

1 conspiracy and it's all been turned over in discovery, so  
2 there shouldn't be any surprises.

3 THE COURT: So --

4 MR. MARTINEZ: Your Honor, if I could add a caveat  
5 to that.

6 THE COURT: Yes.

7 MR. MARTINEZ: With respect to 404(b), we do reserve  
8 the right to introduce any post-offense evidence that may be  
9 generated through jail calls, or what have you, in CDF, to the  
10 extent that that would be post dating the end date of the  
11 conspiracy we charged in the Superseding Indictment.

12 Technically, that would be 404(b), and so if new evidence  
13 emerges that we become aware of between now and the trial --

14 THE COURT: Well, it can be intrinsic if it is  
15 reflective of what was going on within the charged period.

16 MR. MARTINEZ: Correct, Your Honor.

17 THE COURT: It's not intrinsic if it describes  
18 conduct or relates to conduct that didn't occur within the  
19 charged period. That's how that line gets drawn.

20 MR. MARTINEZ: Correct.

21 THE COURT: So what are you saying, there may be  
22 evidence of conduct that occurred outside the --

23 MR. MARTINEZ: No, I'm just laying down the  
24 marker.

25 THE COURT: -- time boundary of the charge?

1 MR. MARTINEZ: All I want to do, Your Honor, is  
2 preserve our ability -- if there are probative jail calls that  
3 happen between now and trial, or during the trial, and there's  
4 an argument that, hey, these are 404(b) and the government  
5 said it wasn't going to introduce 404(b), I just want to  
6 preserve our ability to do that.

7 THE COURT: Well, fine, but you better disclose  
8 them.

9 MR. MARTINEZ: Oh, yeah.

10 THE COURT: And that's what the Court will  
11 ultimately make the determination on is whether or not the  
12 defendants had notice. Whether it was technically described  
13 as 404(b) when it's in this kind of a murky circumstance is  
14 less important to the Court, and what's more important is, did  
15 you know it was coming.

16 MR. MARTINEZ: Understood, Your Honor.

17 THE COURT: All right. Mr. Bussard.

18 MR. BUSSARD: Your Honor, based on the Court's last  
19 statement, that's essentially what my argument is going to be.  
20 As long as we have notice, we don't have an argument. The  
21 government knows its obligation. We hope it does.

22 THE COURT: Yes. Okay. So --

23 MR. BUSSARD: I'm not withdrawing the motion.

24 THE COURT: Yes, well, I'm -- they're denied without  
25 prejudice, is what it is. I don't have any reason to believe

1 that there has been a failure to make necessary disclosure at  
2 this point, on the record that's in front of me. For that  
3 reason, it's denied. It's denied without prejudice because  
4 it's not over yet.

5 MR. BUSSARD: That's fine.

6 THE COURT: What else?

7 MS. HOFFMAN: The next motions are Docket No. 18 and  
8 Docket No. 206. These are motions by Kenneth Jones and  
9 Marquise McCants for the disclosure of evidence pursuant the  
10 Federal Rules of Evidence 609. And again, I think this motion  
11 has been addressed by our response, which lays out the prior  
12 convictions we think should be admitted if the defendants  
13 choose to testify.

14 THE COURT: Okay. So denied as moot without  
15 prejudice. Mr. Bussard.

16 MR. BUSSARD: That's acceptable, Your Honor.

17 THE COURT: And Mr. Francomano, are you on this?

18 MR. FRANCOMANO: Yes, Your Honor.

19 THE COURT: And you understand the Court's ruling  
20 and no objection to it?

21 MR. FRANCOMANO: No objection, Your Honor.

22 THE COURT: All right. You may renew it later if  
23 you've got some new problem, but as far as I can tell, the  
24 disclosure's been made. Anybody else on that motion?

25 MR. BUSSARD: No, Your Honor.

1 THE COURT: Okay. All right.

2 MS. HOFFMAN: And, Your Honor, I just noticed that,  
3 I'm not sure we resolved Docket No. 211, which was Marquise  
4 McCants's motion to suppress social media evidence based on a  
5 lack of probable cause --

6 THE COURT: Wasn't that -- that wasn't the same  
7 affidavit?

8 MS. HOFFMAN: It's the same affidavit, but slightly  
9 different factual circumstances.

10 THE COURT: Did I effectively resolve that  
11 Mr. Francomano?

12 MR. FRANCOMANO: You did, Your Honor, if I could  
13 just make a quick record.

14 THE COURT: Yes, go ahead.

15 MR. FRANCOMANO: Thank you. Your Honor, in our  
16 specific case, the affidavit states that the Facebook account  
17 associated with the user profile, Digga.McCants, was believed  
18 to be used by Marquise McCants. That assertion provides no  
19 information which Judge Coulson could assess its validity or  
20 even that Mr. McCants had set up the account or was the one  
21 using the account. If it is accepted as accurate and he  
22 wasn't the one using the account, the affidavit still doesn't  
23 describe any information contained in the account, provides no  
24 information at all which can be determined whether the account  
25 might contain evidence of criminal activity. And

1 Mr. McCants's account, I don't believe there's any pictures  
2 showing any type of criminal activity whatsoever. I don't  
3 believe there are any conversations involving any criminal  
4 activity.

5 THE COURT: All right. Ms. Hoffman.

6 MS. HOFFMAN: I think the evidence is fairly clear  
7 that it was Mr. McCants's account. The profile picture  
8 associated with the account is a photograph of Mr. McCants,  
9 and as described in the affidavit, Digga is a known alias for  
10 Mr. McCants.

11 THE COURT: Do you dispute the photo depicts your  
12 client?

13 MR. FRANCOMANO: No, Your Honor, I do not dispute  
14 that.

15 THE COURT: Okay. Continue.

16 MS. HOFFMAN: Furthermore, the user name is  
17 Digga.McCants, which is a combination of Mr. McCants's street  
18 name and his actual last name. As far as the probable cause  
19 evidence, the affidavit provided that, first of all,  
20 Mr. McCants's Facebook friends included fellow members of the  
21 BGF Greenmount Regime and co-defendants Wesley Brown and  
22 Norman Handy; that on August 26th of 2010, the day after  
23 Mr. McCants was arrested for committing an armed home invasion  
24 in Elkton, Maryland, Mr. Brown posted a message to his  
25 Facebook account saying, quote, "Free my Nigga Digga," which

1 was a reference to Mr. McCants; and third, on March 27th of  
2 2010, Mr. McCants posted a photograph to the Facebook account  
3 that depicted him crossing his arms in front of his body,  
4 making an X, which investigators knew to be a BGF sign. I  
5 think that last point is probably the most important. There's  
6 clear evidence on the account of him demonstrating that he's  
7 member of BGF.

8 THE COURT: Was that explicitly said in the  
9 affidavit?

10 MS. HOFFMAN: It was.

11 THE COURT: Okay. Motion's denied for the reasons  
12 set out in the government's explanation. What else?

13 MS. HOFFMAN: The very last motions are the motions  
14 to adopt motions of other defendants, which I think were filed  
15 by most of the defendants, and the motions for leave to file  
16 additional motions.

17 THE COURT: All right. So here's how we're going to  
18 deal with the motion to adopt other persons' motions: To the  
19 extent that those -- that you have been heard on your position  
20 that you adopt someone else's motion and you have reaffirmed  
21 that here, that is acknowledged in the record. But to the  
22 extent that there are stray -- the stray joining of motions of  
23 others that have not yet been addressed by the Court that are  
24 hanging there in the record, you're required to tell me now  
25 that you have a motion of someone else's that you joined and

1 that you have not yet been heard on. Speak now or forever  
2 hold your peace. I'm going to rule against you and deny your  
3 capacity to pursue that theory, claim, or motion unless you  
4 tell me right now and bring it to my attention.

5 Starting with Mr. Johnson, Mr. Enzinna, do you have  
6 any?

7 MR. ENZINNA: No, Your Honor.

8 THE COURT: Mr. Davis, do you have any?

9 MR. DAVIS: No, Your Honor.

10 THE COURT: Mr. Welch, do you have any?

11 MR. WELCH: I would, Your Honor, but I believe it  
12 depends.

13 THE COURT: Okay. Your motions in general haven't  
14 been addressed yet.

15 MR. WELCH: Correct.

16 THE COURT: Mr. Bussard, do you have any?

17 MR. BUSSARD: The only motion I would adopt is  
18 Mr. Enzinna on behalf of Mr. Johnson, the social media  
19 motion.

20 THE COURT: I understand that's adopted and denied  
21 for the reasons as I explained to Mr. Enzinna, but you have  
22 your record.

23 MR. BUSSARD: Thank you.

24 THE COURT: Mr. Francomano.

25 MR. FRANCOMANO: No, Your Honor.



1 THE COURT: Mr. Ruter.

2 MR. RUTER: No, sir.

3 THE COURT: Very good, that record is cleared up.

4 Now what?

5 MS. HOFFMAN: There were motions for leave to file  
6 additional motions made by Kenneth Jones, that's Docket 186;  
7 and Marquise McCants, that's Docket No. 208.

8 THE COURT: All right. So the motions deadline has  
9 come and gone. We've had the motions hearing. Mr. Bussard  
10 has made a specific request in a specific context and has been  
11 granted relief and has a motions -- has a motion briefing  
12 schedule set on a specific discrete issue. Any others?

13 MR. BUSSARD: No, Your Honor, not that I'm aware of  
14 at this point. That was the one of concern.

15 THE COURT: Got it. Mr. Francomano?

16 MR. FRANCOMANO: No, Your Honor.

17 THE COURT: So withdrawn?

18 MR. FRANCOMANO: It is withdrawn, Your Honor.

19 THE COURT: Withdrawn and denied as moot. And as to  
20 Mr. Bussard, on behalf of Mr. Jones, withdrawn and denied as  
21 moot, except with respect to the one issue that was previously  
22 carved out.

23 MR. BUSSARD: Thank you, Your Honor.

24 THE COURT: Agreed, Mr. Bussard.

25 MR. BUSSARD: Yes, Your Honor.

1 THE COURT: All right. Mr. Martinez.

2 MR. MARTINEZ: From our point of view, Your Honor,  
3 that's the end of the road. I just wanted to put on the  
4 record that the government appreciates the efforts of the  
5 court security staff and the Marshals for accommodating all  
6 the moving pieces where concerned.

7 THE COURT: Yes, okay. I'll go down the line.  
8 Mr. Enzinna, Mr. O'Toole, anything else in this motions  
9 hearing?

10 MR. ENZINNA: Nothing further, Your Honor.

11 THE COURT: Mr. Davis, Mr. Trainor.

12 MR. DAVIS: Nothing, Your Honor.

13 THE COURT: Mr. Welch, we'll get to you in just a  
14 moment. Mr. Bussard.

15 MR. BUSSARD: Yes, Your Honor. Your Honor, I filed  
16 ECF Paper No. 189, consolidated motion to suppress statements.  
17 It was timely filed and it was not addressed in the  
18 government's response. And we ask the Court to rule.

19 THE COURT: Okay.

20 MR. BUSSARD: I've heard no opposition to our  
21 motion.

22 THE COURT: So tell me what it's about.

23 MR. BUSSARD: Your Honor, there are essentially five  
24 statements and the only information I have are going through  
25 the voluminous discovery. There is a statement made on May

1 10, 2006. I can -- the progress note simply says, "On May  
2 10th, 2006, Detective Sergeant Leonard Willis and Detective  
3 Michael C. Johnson located Mr. Kenneth Jones, a member of the  
4 YGF or Young Guerilla Family." Spelling of Guerilla was  
5 wrong.

6 He was sitting on the steps of 2204 Guilford Avenue.  
7 These detectives transported Mr. Jones to the homicide unit  
8 where he was interviewed and then transported to his residence  
9 of 2204 Guilford Avenue. That is the sum and substance of  
10 what I know, and I don't have a recording. We were not  
11 provided any other details of whether or not he made a  
12 statement and the extent of it or whether the government  
13 intends to use that statement.

14 THE COURT: All right. So your suggestion is that  
15 maybe there was custodial interrogation or some kind of  
16 involuntary statement made?

17 MR. BUSSARD: Yes.

18 THE COURT: All right. Government?

19 MR. MARTINEZ: We don't have any further information  
20 beyond what's in that 11-year-old case file. And I can affirm  
21 that we have no intention of using any statement by Mr. Jones  
22 on May 10th of 2006, so that aspect of the motion, from our  
23 point of view, can be denied as moot.

24 THE COURT: Mr. Bussard, any objection to it being  
25 denied as moot upon the government's statement that they will

1 not use such statement in the trial in their case in chief?

2 MR. BUSSARD: No objection, Your Honor.

3 THE COURT: Okay.

4 MR. BUSSARD: The next statement, Your Honor, is  
5 outlined in the motion, was on January 11th, 2007. Mr. Jones  
6 was allegedly arrested and transported to Eastern District  
7 where it says he was interviewed. There is allegedly an  
8 interview and tape recording. I do not have that recording or  
9 video.

10 THE COURT: Mr. Martinez?

11 MR. MARTINEZ: Again, here, Your Honor, there's  
12 no -- we have no intention of using that statement. It's my  
13 understanding that he just didn't cooperate, didn't say  
14 anything.

15 THE COURT: In light of the government's statement  
16 that they will not attempt to introduce such evidence in their  
17 case in chief, is that motion appropriately denied as moot,  
18 Mr. Bussard?

19 MR. BUSSARD: The next --

20 THE COURT: Is it --

21 MR. BUSSARD: Oh, that's acceptable.

22 THE COURT: Denied as moot.

23 MR. BUSSARD: The next statement was March 8, 2007,  
24 and all I have is some documents that appears to indicate that  
25 Mr. Jones was taken to homicide and asked a few questions

1 regarding a shooting of Vick Roy Fenner, F-e-n-n-e-r, which  
2 took place on February 22nd, 2007, just one handwritten  
3 statement that Mr. Jones says he doesn't -- he heard somebody  
4 had been shot and that's -- that was the extent of the  
5 statement.

6 MR. MARTINEZ: Your Honor, that's part -- that's not  
7 part of this case. We don't need it. We're not going to use  
8 it.

9 THE COURT: Okay. The government has stated that  
10 they will not use such evidence during their case in chief.  
11 Mr. Bussard, it seems appropriate to deny the motion as moot,  
12 do you agree?

13 MR. BUSSARD: Yes, Your Honor.

14 THE COURT: Denied as moot. Next.

15 MR. BUSSARD: The last one is May -- well, the  
16 fourth one is May 22nd, 2013. Again, there's just discovery  
17 within the -- the discovery indicating that Mr. Jones was  
18 taken over to homicide and interviewed, and I believe  
19 there's -- the statement page is actually --

20 THE COURT: Blank.

21 MR. BUSSARD: It just indicates that he was there  
22 and interviewed by a Detective T. Jackson.

23 THE COURT: Mr. Martinez?

24 MR. MARTINEZ: Our response is the same, Your Honor.  
25 I don't think anything materialized from that interview. I

1 think he just declined to answer questions and we have no  
2 intention of using anything coming from that statement as part  
3 of in our case in chief.

4 THE COURT: In light of the government's statement  
5 that they're not going to use anything flowing from that in  
6 their case in chief, Mr. Bussard, do you have any objection  
7 to my denying your motion as moot?

8 MR. BUSSARD: No, Your Honor.

9 THE COURT: Denied as moot.

10 MR. BUSSARD: The final one is October 28, 2013.  
11 Mr. -- and there was a recording of this interview made.  
12 Mr. Jones was taken over to police headquarters. Again, there  
13 was an interview. To the best of my knowledge, there was a  
14 long interview with no admissions to any involvement in any  
15 action.

16 THE COURT: Mr. Martinez.

17 MR. MARTINEZ: I think Mr. Bussard has appropriately  
18 characterized the interview. I also don't think there would  
19 be any factual dispute that he was Mirandized on camera at the  
20 beginning of the interview, such that it would be voluntary.  
21 In light of the fact that it wasn't helpful, we have no  
22 intention of using it as part of our case in chief. So I  
23 think the Court can deny the motion as moot, but we do reserve  
24 the right to use it if he testifies and says something that's  
25 inconsistent.

1 THE COURT: That always reopens the question and  
2 that's always understood with respect to motions to suppress  
3 statements. That's why we always confine it to the fact that  
4 the government has stated that they have no intention to use  
5 the evidence in their case in chief. In light of that, do you  
6 agree that it's appropriate to deny your request as moot?

7 MR. BUSSARD: Based on the government's assertion to  
8 the Court that they do not intend to use the statement in  
9 their case in chief, that's acceptable, Your Honor.

10 THE COURT: Denied as moot.

11 MR. BUSSARD: That's the five statements that were  
12 raised in the consolidated motion.

13 THE COURT: Anything else from you, Mr. Bussard?

14 MR. BUSSARD: Nothing further. Thank you, Your  
15 Honor.

16 THE COURT: Thank you. Mr. Francomano.

17 MR. FRANCOMANO: No, Your Honor.

18 THE COURT: Thank you. Mr. Ruter.

19 MR. RUTER: No, thank you, Your Honor.

20 THE COURT: Very well then. We are ready to adjourn  
21 this motions hearing. One moment, please.

22 (Pause in the proceedings.)

23 THE COURT: Back on the record. The Court has been  
24 maintaining its own elaborate chart of these 50-plus motions.  
25 We show two not yet ruled upon. 222 was a corrected motion to

1 suppress statements. I think it relates to statements of  
2 Mr. Brown that the government has indicated they're not going  
3 to use.

4 MR. DAVIS: That's correct, Your Honor.

5 THE COURT: So that one should be denied as moot as  
6 well for the reason that the government has indicated that  
7 they do not intend to use those statements in their case in  
8 chief. Is that your request, Mr. Martinez?

9 MR. MARTINEZ: It is, Your Honor.

10 THE COURT: And no objection, Mr. Davis, to denying  
11 that motion as moot; correct?

12 MR. DAVIS: Correct.

13 THE COURT: And what about 239, that's one of yours  
14 Mr. Francomano, motion to late file and suppress warrantless  
15 search of Shawn Gregg's cell phone, what happened to that?

16 MR. FRANCOMANO: We'll submit, Your Honor.

17 THE COURT: Okay. Government want to be heard on  
18 it?

19 MR. MARTINEZ: Yes, Your Honor. I think we filed a  
20 paragraph or two on this. The simple fact of the matter is  
21 the phone belonged solely and simply to Shawn Gregg. There's  
22 no --

23 THE COURT: Standing.

24 MR. MARTINEZ: -- standing.

25 THE COURT: The Court finds there's no standing in



this particular defendant. Accordingly, the motion is denied.

That's everything on the Court's list.

The defendant's are remanded to the custody of the Marshal. We're adjourned as to the motions hearing, but we will reconvene at 4:30 in United States versus Harvey. And the defendant's required to be present, although he can be taken out for a comfort break. Counsel are excused. Thank you.

(The proceedings were concluded.)

I, Christine Asif, RPR, FCRR, do hereby certify that the foregoing is a correct transcript from the stenographic record of proceedings in the above-entitled matter.

/s/  
Christine T. Asif  
Official Court Reporter

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